EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

JASON ALFORD, ET AL.,	)
	)
Plaintiff,	)
	)Civil No.
vs.	)1:23-cv-0358-JRR
	)
THE NFL PLAYER DISABILITY & SURVIVOR BENEFIT PLAN, ET AL.	)Baltimore, Maryland
	)
	)February 21, 2025
Defendants.	)10:02 a.m.
_____	)

TRANSCRIPT OF PROCEEDINGS
MOTIONS HEARING
BEFORE THE HONORABLE JULIE R. RUBIN

A P P E A R A N C E S

On Behalf of the Plaintiff:
Benjamin R. Barnett, Esquire
Julie M. Damron, Esquire
Samuel L. Katz, Esquire

On Behalf of the Defendant:
Gregory F. Jacob, Esquire
Meredith N. Garagiola, Esquire
John J. Lapin, Esquire

(Computer-aided transcription of stenotype notes)

Reported by:
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(10:02 a.m.)

THE COURT: Denis, would you call the case.

THE CLERK: Yes, Your Honor.

The matter now pending before this court is civil matter JRR-23-0358, Alford, et al. v. The NFL Player Disability & Survivor Benefit Plan, et al. This matter comes before this Court for the purposes of a motions hearing.

Counsel for the record, starting with the plaintiff.

MR. BARNETT: Good morning, Your Honor. Benjamin Barnett from Seeger Weiss on behalf of the named plaintiffs.

THE COURT: Good morning.

MR. KATZ: Samuel Katz on behalf of Athlaw LLP.

THE COURT: Good morning.

MS. DAMRON: Good morning, Your Honor. Julia Damron on behalf of the plaintiffs for Athlaw LLP.

THE COURT: Good morning.

MR. JACOB: Your Honor, Gregory Jacob on behalf of the defendant plans.

THE COURT: Good morning.

MR. LAPIN: John Lapin on behalf of the plans.

MS. GARAGIOLA: Meredith Garagiola on behalf of the plans.

THE COURT: Good morning, everyone. I hope everyone's travel was uneventful. Have a seat and make yourselves comfortable.

I'll get my act together here.

As Denis said, we are here on Plaintiffs' Motion to Compel Discovery, that is document ECF-134. And I have a couple of questions. I want to hear everybody's argument. Last time we were here, because of the then-pending, still sort of pending motion to hold in abeyance the discovery deadlines pertaining to the 26(a)(2) expert disclosures as well as the class certification reply papers, and Plaintiffs' Opposition to the various individual motions for summary judgment, we talked a little bit about the Motion to Compel that was pending.

I was not yet prepared to really rule on it. I hadn't dug into it. And at that time it had been referred to Magistrate Aslan. I have taken it back, given the fact that it really does bear so materially on where the merits of the case will go.

So I am prepared to hear full argument now, and depending on how this morning goes, we'll then talk about the motion at 132 about the abeyance of deadlines. So I'm happy to hear full argument, Mr. Barnett. And, Mr. Jacob, obviously I'll hear from you after that.

I might have some preliminary questions for you, Mr. Barnett. And I saw obviously the excerpted portions of requests 2 and 3 that are the subject of the motion in the body of the motion --

MR. BARNETT: Right.

THE COURT: -- and in the response, and not that you're required to, but the actual discovery requests themselves were not appended. So I was on a mission to find out the definition of the relevant time period as that term is described or defined.

As far as I can tell, based on the content of Mr. Vincent's declaration and the objections, I've sort of discerned that the relevant time period is April 1st, 2018 through February 9, 2023; is that correct?

MR. BARNETT: That's correct, Your Honor.

THE COURT: So before we begin, as far as the -- why you should get the stuff, tell me why that's an appropriate time period?

MR. BARNETT: So we picked that time period, Your Honor, very specifically because that is when on behalf of the 10 named plaintiffs they started the process of applying for benefits.

THE COURT: That's the earliest date.

MR. BARNETT: The earliest date, correct. And the 2023 date is I believe when that period concluded. And we were aware under the *Chavis* case that certain qualifiers need to be established to focus the discovery on what's actually relevant in the case. So by focusing for those five years, we think the decision letters and physician reports are clearly relevant to our claim.

THE COURT: And I take it that you contend that if you don't get the stuff for that earliest date going forward to February 9, 2023, that that impairs your ability to demonstrate the *Booth* factors that you contend are relevant for the court's consideration.

MR. BARNETT: Not only the *Booth* factors, it would be relevant to the 502(a)(2) claims as well as the other breaches of fiduciary duty. But absolutely it would be critical for the evaluation that ultimately has to be done by the court under the *Booth* factors.

THE COURT: My next question is, and I don't mean to speak for Mr. Jacob, and he'll disabuse me of any misapprehension I might have in this summary, so I'm going to kind of lay a foundation for a question. Basically it's not really a question, at the end I'm going to say "respond."

So as far as I can tell, defendant asserts or defendants assert that the motion for class cert does not rely on any administrative record produced -- I'm going to call it AR -- or any statistical evidence or calculations, and based on that defendants assert that plaintiffs may not now complain that that they, plaintiffs, cannot ably reply to the opposition without the information demanded in requests 2 and 3.

As far as I understand it, defendants suggest further that because a party may not make new argument in a reply that this assertion about needing more documents is additionally

unsupportable.

And I recognize further that plaintiffs also contend that responding to the Rule 56 motions without that information sort of impairs plaintiffs' capacity to do that.

But can you please respond to defendants' contention?

MR. BARNETT: Certainly, Your Honor. So the defendants themselves -- putting aside the question of whether the decision letters and physician reports are relevant to our claims, we believe they are -- they have put this information directly at issue through their class certification briefing and affirmative motions for summary judgment where they try to rely on the V3 data to support their claims.

The problem for them is that the V3 data, by their own admission from Mr. Vincent's affidavit and from other statements made by their putative expert, Dr. Lasater, is very clear that the V3 data is incomplete for that process. It does not have two key pieces of information. It does not have the individual recommendation of individual physicians as to the applicants, and it does not have their compensation.

THE COURT: Yes. So as far -- the way that I read Mr. Vincent's declaration is he basically says -- I think this is at paragraphs 42 and 43 -- that if an application, if the committee or the board approves, one may assume that somewhere along the line a neutral physician gave it the green light for the criteria necessary for whatever benefits were sought by

that player. If there's a deny, one may assume that the board was informed by a neutral physician or more than one neutral physician that those criteria were not met; but it's not populated with the underlying basis for that committee decision or the actual documents demonstrating that that assumption is valid.

MR. BARNETT: I think your reading of the Vincent information is correct, Your Honor. But the problem is what the defendants have done here is -- so, for example, say four doctors review a benefits application and three of those doctors say, "No, the applicant is not entitled to benefits," one doctor says "Yes," that yes is then attributed or credited to the other three doctors even though in reality they all voted against the benefit application.

THE COURT: Explain that again, I'm confused.

MR. BARNETT: My understanding -- and I should have said this earlier, Your Honor, but I am not by background an ERISA attorney. I am surrounded by those who are more learned in ERISA.

THE COURT: So am I.

(Laughter.)

MR. BARNETT: Well, I'm learning on a daily basis as quickly as I can. But if there is a question that is particularly technical in terms of ERISA, I hope it's okay if I turn to Mr. Katz --

THE COURT: Yes.

MR. BARNETT: -- because you're likely to get a quicker answer and one more accurate.

THE COURT: All right.

MR. BARNETT: So putting that aside, my understanding is what the defendants have done here in their V3 data, or in the Lasater analysis of the V3 data, is not to track what the individual recommendations were, but then take the final decision and credit it regardless of how the physicians voted.

THE COURT: Okay.

MR. BARNETT: So, again, an example is if you had four physicians and three of which said "No, this applicant is not qualified for these benefits for which they applied," and one says "Yes," then all four of them get credited for that one yes. And that is just -- it's inaccurate.

And the only source -- the only source that exist that actually captures what individual physicians recommended are the decision letters that we're seeking for our motion.

THE COURT: And those are not banked in V3?

MR. BARNETT: No. Our understanding is that is not information that is captured in V3. And it apparently was a business decision that was made not to capture that information in order to try to enhance the independence of the retention decision of the neutral physicians.

Of course we think that's nonsense. But that's not for

today. That's for another time.

THE COURT: Okay. All right. All right. I think I'm going to hold back on any other questions. If I interrupt you I apologize in advance. Go ahead.

MR. BARNETT: No, I would welcome, they're not interruptions. We have prepared a PowerPoint presentation for today. I pledge to you we are not going to read through it, but you did set aside two hours for argument which in my experience is an extraordinary amount of time.

THE COURT: Well, my objective is, you know, I may rue the moment I said this, but I am not one for time limits unless, you know, my experience with particular lawyers recommends that path.

(Laughter.)

THE COURT: I don't find that to be the case here. So that's just sort of a rough sketch of what, you know, but I want to get this right and be thorough. So no one's here on a clock.

MR. BARNETT: Well, again, we very much appreciate all of the time and attention that the court has devoted to the motion. I will work my way through the PowerPoint.

THE COURT: Okay.

MR. BARNETT: I will try to do it quickly and just highlight the key points. Obviously if you have questions, that's why we're here. So we're not locked into going through

it. And just so the court knows, we provided a copy of the PowerPoint to defense counsel this morning. We were -- we tried to be absolutely scrupulous. It's all the same case law in our briefing. It's all the same facts in the briefing. There's nothing new.

THE COURT: Nothing extra.

MR. BARNETT: There's nothing extra, there's nothing new. This will be addressed down the road.

THE COURT: Is this the slides? Are these --

MR. BARNETT: We do have a hard copy.

THE COURT: Oh, this is Defense Exhibit 1. Yeah, if you have a copy of the slides I would -- if you don't, don't fret. It would be helpful if you have it.

MR. BARNETT: Permission to approach?

THE COURT: Yes, please. Thanks.

MR. BARNETT: Thank you very much.

THE COURT: Yes. Ready to roll.

MR. BARNETT: Ms. Damron and I are going to try to communicate telepathically.

THE COURT: You do what you need to do.

MR. BARNETT: We're here, Your Honor, obviously on the plaintiffs' motion to compel.

THE COURT: Mr. Barnett, I'm going to ask you to hold off one second. I neglected stupidly to bring out a copy of the complaint itself. I attempted to make a mental note to do,

which you can see how that pans out when I don't write it down so just give me a moment to get that out here.

MR. BARNETT: We're having technical issues, Your Honor, so . . .

THE COURT: Okay.

MR. BARNETT: Maybe while we're waiting for that, Your Honor, and I don't want to introduce an extraneous issue but I think it is going to come up. So defense counsel did give us a few documents today that they're apparently planning to use in the argument and they were produced in discovery.

THE COURT: Okay.

MR. BARNETT: But they were not relied on, as I understand it, Mr. Jacob can correct me if I'm wrong, they were not relied on the briefing.

THE COURT: Okay.

MR. BARNETT: So we just want to lodge an objection.

THE COURT: Okay.

MR. BARNETT: Obviously it's up to you what you want to hear, but we just object to them being introduced at this point.

THE COURT: I understand.

MR. BARNETT: This has come up before and the court's been very clear that briefing is complete on the motion.

THE COURT: Yeah, my response about the briefing being complete was more in response to Mr. Jacob's position that he

was unable to respond to the motion to compel without plaintiffs' 26 disclosure.

MR. BARNETT: Ah.

THE COURT: But I hear you, so we'll get there. Well, in any event, go forward. It's coming.

MR. BARNETT: So if we go to the next slide. So the court's clear on why we're here today, we're seeking the court granting our Motion to Compel the Production of the Decision Letters and the Physician Reports that are relevant to all of our claims under 502(a)(2) and 502(a)(1)(B).

There is a plethora of case law starting with *Glenn*, to the Fourth Circuit's decision in *Helton*, to multiple District of Maryland decisions, including *Chavis*, *Chughtai* and *Balkin* that fully support the targeted discovery that we're seeking here.

This information is relevant to our claims. It's relevant to their defenses. And as we discussed briefly during the January 16th conference, it's ultimately relevant to the court's assessment of the *Booth* factors.

As we just discussed in response to your question, it's also relevant because it actually will do what the V3 data won't do, which is give us the individual recommendations of those physicians.

We start with these files specifically, Your Honor, as our first motion to compel because they're critical, and they're

important to all of our claims. They relate to inconsistent interpretations, misrepresentations as to what documents were actually reviewed. They go to the defendants' conflicts and potentially bad faith motives, the misrepresentation about doctors being absolutely neutral.

We will address -- the court raised it before, the pattern and practices of ERISA violations required by federal law. Ultimately, a fraudulent scheme that denies applicants the benefits that they're entitled to under the plans and under ERISA. And all of that is separate and apart from the wrongful denial benefit applications. That is just one claim that we're making, and all of the other claims are independent of that, and this is the key information that will address all of those.

All right. As set out in our briefing, Your Honor, the discovery standard for discovery sought under 502(a)(2) is Rule 26 and it just has to be relevant and proportionate.

And we are alleging, you know, more than seven breaches of fiduciary duty. And all of this evidence goes directly to those claims, and it's evidence that has been recognized both by the Fourth Circuit in *Helton* and Judge Coulson in the *Chavis* case as being relevant to 502(a)(2) claims.

Go to the next one, please.

I'm going to tick through these quickly. You'll see that we tried to adopt a common structure here regarding all of our 502(a)(2) claims. We highlight obviously the discovery

standard, the existing legal authority that exists and to the extent that if the defendants responded to this in their opposition.

And the first claim is really a bit of an umbrella claim and courts have recognized that a claim can be -- exist where a plan has objectively unreasonable conduct considered in the aggregate. This touches on many of our claims, but it is a separate claim. And this evidence is directly relevant to it because it would allow us to show, as mentioned in *Chavis*, that the plans continuously act in an objectively unreasonable manner.

Again, as I referenced before, unlike other cases, we believe that there is evidence that this plan is actually a fraudulent scheme, which these physicians, these, quote/unquote, "neutral physicians" are fraudulently represented as being absolutely neutral when they are not.

And those decisions, those benefits decisions are built on flawed physician reports that minimize genuine medical conditions.

The court has actually in some respects already addressed this issue in part in the context of the 12(b)(6) motions where you ruled that the allegations met the standard for Rule 9(b).

In our view, we don't have to show that we're entitled to discovery. All we have to do is show that it is relevant and proportionate under Rule 26, and we're entitled to this

discovery.

Next slide, please.

This one is a relatively simply one but it's a critical one, and it goes to which documents were actually reviewed. And there are instances in which these decision letters say all of the information was reviewed in making that decision. And we're allowed to test whether, in fact, that is actually true.

And, in fact, after the *Cloud* case, we're permitted to try to find out whether any of the information was actually reviewed before they made those decisions.

Next slide, please.

The next claim is grounded in the bias of the physicians themselves. And, again, this goes to the heart of what the claims are because our contention is that the evidence in terms of the individual recommendation made by physicians, coupled with the compensation information, will demonstrate that the reason that there is a connection and a correlation between those recommendations and the amount of money that the physicians receive.

Excuse me one second.

The next claim goes to the failure to investigate bias and inadequate work performance on the part of the physicians.

So if, in fact, you know, the plan learns that a physician is biased in making their decisions or is not performing at the level that the plan expects, then the plan is obligated to take

actions. The plan is obligated to remove that bias or remove that physician if they're unable to do so or they're unable to perform. And getting the decision letters involving the individual recommendations is critical to us pursuing this claim.

Next one, please.

There we go. So this is a little bit of a preview slide, and we'll get back to this. But we need the decision letters, and we need the physician reports, including the PRFs and the narratives, to see if these physicians improperly applied race and ethnicity factors in making their decisions.

And we're going to jump back to this with respect to Dr. Macciocchi in a little bit.

THE COURT: Are you seeking to demonstrate that based on the impact?

MR. BARNETT: So it's a couple of things. So, for example, in terms of T&P benefits, the plan documents say that education shall not be considered, but we have seen decision letters or -- I'm sorry -- physician reports that clearly include education level in reaching their decision, and that's improper. That's inconsistent with the plan terms. They say they wouldn't do that.

And we also -- and, again, we can jump ahead if you want to --

THE COURT: But I take it that there's another bridge

to cross there? In other words, by virtue of an inappropriate consideration of education, assuming that one can, you know, assume that mention of it means it was a considered factor, that that has a disproportionately adverse impact on a protected status class?

MR. BARNETT: No, I think it's not -- it's not like a Title 7 issue.

THE COURT: Right.

MR. BARNETT: It's that it impacts this decision.

THE COURT: Okay.

MR. BARNETT: If a doctor says, "Well, he can continue to work based on his educational level," and the plan documents say you shall not consider educational level then that means the decision is improper.

THE COURT: I see.

MR. BARNETT: It's inconsistent with the plan terms.

THE COURT: I see.

MR. KATZ: Your Honor, you are correct. It is based on inconsistent treatment based on race. Based on the factor of race, which is being considered or being treated differently based on the color of their skin or their ethnicity. And we do have documents that we attached as an exhibit to the motion to compel on Plaintiff [redacted], for example, where the doctor explicitly considers his ethnicity when determining whether he has an impairment or not.

THE COURT: Okay.

MR. BARNETT: Does that answer your question?

THE COURT: Yeah.

MR. BARNETT: Then we obviously have other claims related to the breaches of fiduciary duty related to loyalty and care. And the examples of those, again, come directly from the decision letters in terms of bizarre interpretations done by the plan, you know, the continuous disregard for legal precedent.

I mean, there have been instances where a federal court says, "Hey, NFL plan, you can't do this anymore," and then another court years later says, "We told you not to do this. You are still doing that."

In doing that, they're disregarding legal precedent.

And, ultimately, we want to piece together whether they have multiple erroneous interpretations of the same or similar provisions because all of that would violate ERISA. And we've included a couple of case cites there. For example, in *Brumm* and *Mickell*, the federal courts specifically criticized the defendants from ignoring prior rulings from federal courts.

So, ultimately, the cases that the defendants cite in their opposition, none of them really relate to 502(a)(2) claims for fraud schemes. They're not applicable to the facts of this case as pled, and therefore they really have not presented the court with any legal authority to deny the

discovery that we're seeking. So that's 502(a)(2).

Now we want to shift focus -- I'm sorry, any questions on 502(a)(2) before I shift?

THE COURT: Before I say no, let me -- I'm trying to track it with the claims as identified as counts. But maybe that doesn't make sense. Okay. Go ahead.

MR. BARNETT: So now we're going to shift to 502(a)(1)(B). And, again, the discovery standard is obviously somewhat different but there is, again, a significant amount of case law in the Fourth Circuit and the District of Maryland that specifically approve of what we're asking to do here, which is to go beyond the administrative record, because the administrative record by definition is not going to contain the evidence or the information that's relevant to our claims.

And the standard is actually relatively modest.

The evidence has to be known by the plan, by the defendants, and clearly decision letters, physician reports, PRFs, narratives are all known to the plan. They're the ones who created them or asked them to be created. And it's necessary to address the *Booth* factors.

THE COURT: So that restriction, or I shouldn't say restriction, but that proviso that it can't be based on documents that were not before the decision-maker is quite separate and apart from the fraud-based claims?

MR. BARNETT: Correct.

THE COURT: Okay.

MR. BARNETT: And so we've identified five *Booth* factors. And, again, we'll try to move through them relatively quickly. But we don't have a single basis to discover -- to get this discovery, we have multiple bases. And any one of them alone would be sufficient to entitle us to this discovery.

Again, I'll try to march through them as quickly as possible. All of this is in our briefing. We are just trying to consolidate it for the convenience of the court and try to organize our discussion today.

So in each of these sections we've laid out the applicable law at the top. And we've tried -- one of the criticisms in the opposition is that we hadn't made a sufficient showing, we hadn't alleged particularized facts. To address that point, we had included here both the showing and the particularized facts with cites to the record that exists before the court. But these are only examples. There are others in the briefing. These are ones we just wanted to highlight.

THE COURT: Yep.

MR. BARNETT: So obviously, you know, how a plan has -- if a plan interprets a plan which is inconsistent with other terms in the plan, or is inconsistent with how they previously interpreted the plan, that's a relevant consideration for the court to consider. And that's exactly what the court did in *Cloud* and that's what the court

acknowledged in *Helton*.

And here we have, you know, one of the key plan terms is "adequate determination," and we've already identified, as have prior federal courts, inconsistencies in how these defendant plans interpret the term "adequate determination."

And we have other examples in terms of the plan terms for line-of-duty points and where points are awarded for one case -- I'm sorry, let me start again.

So you have two applicants who basically have the same physical condition and in one case they're awarded LOD points and in another case they're not. It's that kind of discrepancy that we believe fully justifies us getting discovery outside of the administrative record.

We can go to the next one.

Factor 8. Obviously this is a -- this is a huge factor.

THE COURT: I want to back up for a second.

MR. BARNETT: Sure.

THE COURT: You've identified on slide 13 factor 3, but there's no standalone slide for that, is that because it's sort of self-evident?

MR. BARNETT: So it's coming later.

THE COURT: Okay.

MR. BARNETT: We put them at the numerical order at the beginning --

THE COURT: Do I get points for paying attention?

MR. BARNETT: Yes, you do. Huge points.

THE COURT: All right. Go ahead.

MR. BARNETT: That was actually something we debated because some people said, no, we have to go in order.

THE COURT: I'm very linear.

(Laughter.)

MR. BARNETT: Huge credit for noticing that this is technically a little bit out of order.

So factor 8, obviously it's the fiduciary's motives and, and this is important, any conflict of interest. And, again, we will get to this later, the defendants suggest that there's a requirement for us to show a structural conflict. That's not consistent with the case law. The case law is any conflict of interest.

So again, as *Helton* said, the courts need access to this evidence to see how a conflict may have impacted the adequacy of the administrative record or the benefits determination.

And, in fact, some courts have said it's evidence to show a pattern in their practice of denying meritorious claims. Again, this is key information. It's not going to be in the administrative record, and the starting place for us to get this information is the decision letters and the physician reports.

Let's go to the next slide, please.

And this is particularly important in this case because we

do have a history of bias claims administration. You know, in the *Cloud* case, the defendants there were arguing that what the plaintiffs were seeking or what the court was requiring was unprecedented. It was unprecedented. And it apparently came up many times.

And the judge in *Cloud* said it's hardly unprecedented because dozens of former NFL players have lodged similar challenges and the court's findings echo the concerns already expressed by those courts across the country.

And just to give the court a snapshot of what we're talking about here, and we couldn't fit everyone into one Hollywood Squares slide but we did our best, and these are instances of NFL retirees being denied benefits under the plan either totally or at the level that they requested; bringing suit against these defendants and the courts' conclusions about the bias that's evident in these plans and how they're administered.

THE COURT: Can you just, I want to read these for a second. Give me a moment. I read the *Cloud* case.

MR. BARNETT: These are taken from footnote, it's either in the motion to compel or it's in the reply.

THE COURT: I think it's in the reply.

MR. BARNETT: But they're all directly taken from what we filed with the court.

THE COURT: Now that I'm reading this, it's familiar.

MR. BARNETT: In part we do this because these aren't just case citations, but these are actually retired players who have been through the same gauntlet to try to get benefits under the plan, and federal courts in reviewing the actions of these plans have criticized them heavily for what they're doing. We think this alone is sufficient basis to order -- to target a discovery that we're seeking here.

THE COURT: Okay.

MR. BARNETT: So now we're going to drill down into some of the particularized facts regarding Dr. Macciocchi. Again, to us, this is just an example. It's possibly the most egregious. But it's an example of why we absolutely need this discovery.

So Dr. Macciocchi, he's the highest paid neuropsychologist. He's making, you know, over $1.6 million, and he has -- we've gathered this through our research -- he has made a number of -- I'm not even sure what the right word is -- but alarming publications and even marketing materials that talks about injuries, that talks about diminishing injuries, that the role of race that can be played in terms of test performance and that demographic factors can be more important than test scores.

MR. KATZ: He said demographic factors are more important or lead to more variance than the impact of traumatic brain injuries.

MR. BARNETT: All right. Let's go to the next slide.

So, again, we have found marketing materials from a seminar in 2016 where he's talking about defending psychological injury claims and traumatic brain injuries. He's talking about ways to defeat those claims and convince juries that a plaintiff's brain is hard boiled and not scrambled.

And this --

THE COURT: Are these -- you may not know, I know you're referring to that as -- well, I'm looking at the second bullet point -- I'm just spitballing -- was this a presentation at some sort of an educational seminar on helping people become expert witnesses? What was this?

MR. BARNETT: Sam. Go ahead and stand.

MR. KATZ: Sorry, Your Honor. It was a seminar dealing with a law firm where the stated aim of the panel was what you see at the top, defending against psychological injury claims and mild traumatic brain injury claims in the wake of DSM-5.

THE COURT: I see.

MR. KATZ: So the seminar or the panel was about how to defend against claims, and he's introduced in the materials, his panel in particular, will inform on ways to defeat or mitigate these claims based on current science and explore how best to convince a jury that a plaintiff's brain is hard boiled and not scrambled, which goes to the heart of his biased views

and why the defendants have this knowing use or why they should know at a minimum of his bias.

THE COURT: Okay.

MR. BARNETT: Can we go to the -- we just want to highlight for the court, and again this is fully in our briefs as well, but it's the *Jefferson v. Sellers* case, which came out -- was issued by the district court in the Northern District of Georgia two months before Dr. Macciocchi was actually promoted by the plan for expert consulting services.

And the district court was -- and this involved a case of a two year old who was run over by a car, and there was a question about whether the child had a brain injury. And Dr. Macciocchi concluded that there was no moderate to severe brain injury because there was no skull fracture.

And the district court judge completely rejected that conclusion pointing to, of all people, football players who suffer brain injuries even though they're wearing a helmet and they don't necessarily fracture their skull playing the game.

Equally troubling is the fact that Dr. Macciocchi, he's not a neurologist, he's not a medical doctor.

THE COURT: What is he?

MR. BARNETT: I think he's a Ph.D., I believe.

THE COURT: Well, I should hope so if he's calling himself a doctor and he's not a medical doctor. But I'm interested in his field of expertise.

MR. BARNETT: Sam, do you know?

MR. KATZ: He's a neuropsychologist.

THE COURT: Okay.

MR. BARNETT: In any event, the *Jefferson v. Sellers* district court decision is pretty scathing in attacking Dr. Macciocchi's opinions in that case.

Let's go to the next slide.

I mentioned that he had been promoted. In the plans, in the wake of the *Jefferson* decision, two months after that they decide to promote him. And his new responsibilities, for which he's paid more money, not just the exam fees but now he's paid a consulting services fee is to, quote/unquote, "teach the other physicians," and help prepare training materials for the plan-neutral physicians, and provide recommendations in terms of the plan's form, processes, and neurological medical exams.

THE COURT: And I take it this is in some kind of engagement.

MR. BARNETT: It's in a contract.

THE COURT: A contract.

MR. BARNETT: Yes, Your Honor.

THE COURT: Okay.

MR. BARNETT: So in our view, Dr. Macciocchi's involvement, and clear bias, it infects the entire evaluation process because he's teaching other plan physicians. And we've actually already seen this in the limited production to date

made by the defendants.

THE COURT: What the "this"?

MR. BARNETT: We've seen -- I'm sorry, I should have added that. What we've seen is that racial and educational norms are being included by other neuropsychologists in their review. And we've included references to the plaintiffs where we've seen that in consideration of their disability applications where they weren't necessarily reviewed by Dr. Macciocchi. Correct, Sam? They were reviewed by other --

MR. KATZ: Some were reviewed by Dr. Macciocchi, others were not. But in all of these examples, demographic norms, which include both education level and racial norms that treat Caucasians differently from African Americans, are being applied in all of these cases.

THE COURT: Okay.

MR. KATZ: The impact of these racial norms is that somebody that's African American, even if their IQ without considering race would be higher, they're being normed to be lower as a result of that, whereas Caucasians are being upward adjusted.

So, for example, [redacted] who's mentioned here, who is Caucasian, his IQ when considering demographic norms was -- I want to say it was definitely above average, if not whatever is higher than an above-average IQ. Whereas, the other plaintiffs here, who are not Caucasian, they're saying demographically

adjusted norms applied to them as well.

THE COURT: Okay.

MR. BARNETT: And the other critical piece here is that this had to have been known by the plans. The plans had to know that Dr. Macciocchi had these views. And so they are continuing not only to employ but to have him teach other neutral physicians as well. It's the knowing use of a biased physician that really goes to the core of our claims.

THE COURT: And I'm not saying that this is determinative, but are you saying that they would have to know for a couple of reasons, one, because he's included what you've described as inappropriate factors in the letter but also because of just what is generally publicly available about him?

MR. BARNETT: Correct. Correct, Your Honor.

THE COURT: All right.

MR. BARNETT: Now we're going to shift and spend a little bit of time in factor 6. Unless I've exhausted your patience already?

THE COURT: No.

MR. BARNETT: Okay, good. And this is a key area, and it's one that the court picked up already on back during the January 16th conference, which is a pattern or practice of ERISA violations.

So there were regulations issued in 2018 by the Department of Labor that were incorporated into the statutes that set out

certain requirements that all ERISA plans have to meet.

I'm going to try to move through them quickly, but all of them are relevant here because they show a pattern and practice which is illegal.

THE COURT: Those DOL factors are relevant here?

MR. BARNETT: Yes.

THE COURT: Go ahead. Because it shows a pattern and practice of ERISA violations you're saying?

MR. BARNETT: Right. Let's go to the next slide.

The first one is consistent treatment of similarly situated claimants. These plans are required to ensure that claimants that are similarly situated are treated consistently. And the only way to do that is to look at the decision letters and physician reports across multiple claimants, and that's exactly what the district court ordered in the *Cloud* case. The *Cloud* case was a single plan. It didn't have 10 plaintiffs.

THE COURT: Yep.

MR. BARNETT: And so ultimately the district court, on this basis, ordered the defendants to produce thousands of pages of decision letters to allow them to do that analysis to see if, in fact, there was consistent treatment.

Again, we have already, through the limited production, we have already identified inconsistent treatment between similarly situated applicants and that is set out in the exhibits to our motions.

Let's go to the next one.

This is actually a pretty easy one. So there are now requirements in place for ERISA plans that decision letters must meet certain requirements. There are five of them, and we've highlighted them in this slide.

And so as, in a very practical way, we're entitled to production of these decision letters to see if, in fact, the decision letters issued by the plan comply with all five of these requirements.

Again, the next one is, it's really common sense. The requirement is that the plan review all comments, documents, and records or other information. They are obligated by law to do so. If, in fact, we determine through the production that they did not review all of that information then they have violated ERISA.

And, again, *Cloud* has led the way in this case because in *Cloud* the court determined through discovery as a result of discovery that board members do not review all the documents in the administrative record and was not their practice to review all the documents in the administrative record. So, again --

THE COURT: Am I remembering, this is where the judge found that they employed a law firm whose associate or paralegal would come and present in an off-record meeting a summary, and then they would reach sort of an informal conclusion at that off-record meeting, and then go have the

record meeting with minutes and take a vote.

MR. BARNETT: Correct. It's the Groom law firm that was involved, and they didn't actually review the materials themselves. They didn't even tell the paralegals to read all the documents. They just completely outsourced the function to the Groom law firm.

Let's go to the next one.

THE COURT: I have a question.

MR. BARNETT: Sure.

THE COURT: On slide 26, the particularized facts -- I know these are just sort of snapshot samples. When you articulate that the letters contain defendants' representations of what materials, documents, and records were allegedly reviewed, and you cite to Exhibit D to the Motion to Compel where, you know, various and sundry committee letters indicating sort of a -- the language of "we reviewed everything you submitted."

So are you taking the position that these examples, just as a standalone, isolated example should raise an adequate concern about the board's decision not articulating what exactly was reviewed because the summary itself is not adequate, or we don't believe them?

MR. BARNETT: So it's really just a starting point, Your Honor. We need to establish what they have represented they reviewed.

THE COURT: But why are these examples the examples you're using? In other words, what's problematic about them?

MR. BARNETT: Because at least two of them, I'm looking at them quickly, they say that we've looked at all of the records. And if it turns out they didn't actually look at all of the records, or it turns out they didn't look at any of the records then that's evidence of the support of our claim.

THE COURT: Right. But what I'm saying is that's your conclusion. Where is it coming from? In other words, the letters say we reviewed everything, and you're using this as an example to support the suggestion that extra AR documents should be produced. Why, in terms of these examples? In other words, if they say what they say, what are the things that you're relying on that suggest that that's not the case?

MR. KATZ: Your Honor, it is what -- the extra record discovery that was produced in *Cloud* where the multiple board members, including a current board member, stated that their practice is that they do not review all of the records.

THE COURT: Right.

MR. KATZ: Which is why we would, it would render it necessary for the court to adequately assess whether there's a pattern or practice given a suggestion that there is this particularized fact or particularized support that they have this practice of it. And really, it goes to another factor, the inconsistent interpretations or inconsistent treatment.

Where sometimes they're saying they reviewed everything in the plan file. Sometimes they're saying they reviewed the materials in the file. Sometimes they're saying they reviewed medical records. And sometimes they're just saying they reviewed the application.

THE COURT: Okay.

MR. KATZ: And we would need to see whether there is this pattern or practice.

THE COURT: So I'm going to put *Cloud* aside for a second.

So in this cited examples you've got sort of an inconsistent way of describing what was reviewed and a lot of those descriptions, if taken on their own, are insufficient to reach the conclusion that the board reviewed everything in the record.

MR. KATZ: For some of them.

THE COURT: For some of them. For some of them not. And then taken as a total it demonstrates an inconsistency you're saying or it suggests an inconsistency.

MR. KATZ: Correct.

THE COURT: And then against the backdrop of the very strongly worded opinion in *Cloud*.

MR. KATZ: Correct.

THE COURT: All right. I got it.

MR. KATZ: As well as the depositions themselves in

Cloud which used the phrase "as practice."

THE COURT: Okay. Yeah.

MR. KATZ: Thank you, Your Honor.

MR. BARNETT: All right. Let's move on to the next one. And this one I do want to spend a minute on, Your Honor, because it's extremely important. And we've cited the language from the reg at the top.

THE COURT: Let me read it all.

MR. BARNETT: Okay. Just read the first part.

THE COURT: Yeah, the purple. That's what I meant.

MR. BARNETT: Exactly.

THE COURT: Is that for the Ravens?

(Laughter.)

THE COURT: Okay. Got it.

MR. BARNETT: So, by law, these defendants are obligated to ensure that all claims and appeals for benefits are adjudicated in a manner designed to ensure the independence and impartiality of the persons involved in making a decision. That's an obligation under federal law.

And we are seeking this discovery because allowing -- it'll allow us and potentially eventually the court to assess whether, in fact, the defendants have a pattern and practice of failing to do so, of failing to ensure that everyone involved in the process is independent and impartial.

All right. This one is an easy one, which is we need

them -- we need the decision letters to see whether, in fact, the defendants are ignoring governing plan documents. If their letter is inconsistent with the plan, the terms of the plan documents, again, that is evidence of pattern and practice of ERISA violations.

By regulations, the plans are obligated to conduct the de novo review of the committee decisions. Committee makes the initial decision then it can be appealed to the board. The board has to do a de novo review and come up with its own decision with no deference to the committee.

But, again, they're using the same advisors for both the committee and the board, and they are outsourcing that work to those advisors. They're not conducting, at least our contention, they're not conducting a de novo review, and having the decision letters will allow us to try to establish that fact.

This is a -- it's a smaller but it's an important example, and it's something we have specifically asserted with evidence in support of our motion. One of our plaintiffs requested information from the plans related to the reputation, bias, and predisposition of the plan physicians; and they rejected that request to provide that information deeming that it was not relevant to the claim and that they disagreed with a federal judge's conclusion -- is it a federal judge -- federal judge that in fact the physician was conflicted.

All right. That was it for factor number 6.

And now, out of order, we will take factor number 5 which really goes to, you know, the reasonableness of the decision-making process.

And, again, there have been multiple federal courts, multiple federal courts have reviewed the decision-making process of these plans and found them to be wanting. And we've identified the three cases in this slide.

But, again, as I said previously, any one of these factors is sufficient to give us this discovery, and we're presenting the court with five, including factor number 5 which allows us to test how these decisions were made.

And then last but not least is number 3, you know, what is the adequacy of the materials that they used to make that decision, and are those materials actually consistent with the decision that they reached? And the only way that we get to that is through the decision letters and the physician reports, the PRFs and the narratives.

I wanted to address three issues that came up both in the briefing and to some degree in the prior argument.

And I am headed towards the homestretch.

THE COURT: I'm not complaining.

MR. BARNETT: There was discussion about *Abromitis*, and in our view that decision does not foreclose at all the discovery that we're seeking in this case. It was issued prior

in the Supreme Court's decision in *Glenn* and it doesn't address at all our claims under 502(a)(2). And actually, *Abromitis* is a different case because there was not information in that case about false, inaccurate information in the decision-making process when obviously that sort of allegation and information is critical to our case.

Equally important, other courts in this district, Judge Simms and Judge Grimm, have ordered this kind of discovery, including the doctor's recommended denial rates both in *Chughtai* and in the *Balkin* case.

And the statement in the *Abromitis* case in terms of the discovery, it may not have been endorsed but it wasn't foreclosed. The court didn't say this was not permitted.

And the *Glenn* case, the Supreme Court decision said that the conflict may extend to its selections of physicians, which is exactly what the situation is here.

And in the *Adams* case at the bottom, the court noted that: The knowing use of biased doctors would be some evidence of bad faith.

So we don't believe *Abromitis* forecloses the discovery that we're seeking here.

Next slide, please.

An issue that came up is the suggestion that we must, in order to get this discovery, you know, we have to prove that there's a structural conflict. Again, we don't believe that

that is at all the case. Whether a structural conflict with this plan exists has no bearing on our 502(a)(2) claims. And the Supreme Court in *Glenn* was very clear in saying that they weren't going to try to delineate or describe all of the types of conflicts that might exist because benefits decisions arise in too many contexts, concern too many circumstances, and can relate to too many different ways of conflicts. They vary in degree of seriousness to come up with a one-size-fits-all system.

THE COURT: Also somewhat necessitates a mini-trial within a trial.

MR. BARNETT: Absolutely. And, again, the *Cloud* case ordered this extra AR discovery without any showing of a structural conflict. So we don't believe there's any obligation on our part to establish as a threshold that there's a structural conflict with the plan.

All right. Next slide.

The defendants, they point to the V3 data. I'm just going to touch on this briefly. We talked about it towards the beginning. But the V3 data is it doesn't provide a sufficient back-factual basis because it's incomplete. And it's also, based on work we've done to date, it's also inaccurate. It doesn't accurately contain the decisions that are in the defendants' own documents in terms of the decision letters and the physician reports.

But, again, it does not contain the individual physician conclusions or the rationales, and it does not include the annual compensation that the plans paid to the defendants.

You don't have to take our words for it, you know, the declarants from the defendants admit that the V3 data does not have that information and that producing it would require a manual review.

So, in summary, Your Honor, at least for now, you had said at the last conference that you were willing to walk out on the precipice but we need to give a darn good reason, and we think there are many darn good reasons for you to grant the discovery. And it's all of the case law and all of the precedent, either from the Supreme Court or the Fourth Circuit, or all of the district court decisions that we've listed here.

And you had said, you know -- we don't think you need to put a helmet on -- you said you would have to put your helmet on, we think that this precedent gives you a rock-solid foundation to grant this motion for this critical evidence that we need in this case.

THE COURT: Thank you. Yeah, I wasn't intending to make a joke about football, I just more meant that I understand that the defendants will be vigorous.

I appreciate that. I'm going to take a brief recess. Everybody can stretch their legs and use the restroom. We'll come back in 10 minutes.

(There was a break at 11:07 a.m. to 11:26 a.m.)

MR. JACOB: Thank you, Your Honor. May it please the court. Before I get into the meat of the motion to compel, I just wanted to address the two preliminary questions that you asked Mr. Barnett in the discussion that you had with him.

The first of those is what is the relevant period?

And in your Motion to Dismiss Order, this is ECF-82 at 3, you determined that in order for any benefit claim to be operative because of the statute of limitations that's built into the plan, the final board decision had to be issued by August of 2019.

So Mr. Barnett said, "Hey, some applications may have been filed before August of 2019," we agree with that. But the relevant date isn't to just randomly pick April of 2018 as the date that an application might have been filed and count that as the relevant date. Rather, any decision, any board decision that was issued in August of 2019, or later, would constitute the universe of relevant claims.

THE COURT: Well, that's the universe of claims for which they could recover, but I'm not sure that it's exactly the same -- I'm not sure that I agree with that logic in terms of what might -- and I'm not telegraphing -- I'm just saying I'm not sure that I agree that that would necessarily then dictate the cut-off period of evidence that might be discoverable for purposes of demonstrating what the issues are

and that I would have to evaluate.

MR. JACOB: As Your Honor knows, when we produced claims data, much for that reason, we gave a birth all the way back to January 1st of 2018, so that we could see the progression to the extent that plaintiffs would have an argument that patterns began to develop a year before, or a year and a half before. We've already done that with respect to the claims data.

But when we're talking about producing 20,000 underlying documents, which is what they're asking for here, we think that the most relevant cut-off point would be where the court has said benefit claims may be live. That's still going to generate, were the court to order those produced, thousands and thousands and thousands of documents. There's no reason to inject benefit claims that aren't live into the universe of any production in light of that.

The second point that I wanted to cover that came up in that discussion with Mr. Barnett is his assertion that we just don't know what the individual doctors' recommendations were from the V3 data. And Your Honor correctly pointed him to the Vincent declaration that says, this is in part because of the way the neutral role operates: If the assigned neutral physicians have not found the individual to be disabled, benefits can't be awarded.

And because the claims data shows whether each application

was approved or denied, we know that every approval, the neutral physician -- at least one of the neutral physicians assigned did find the player to be disabled.

THE COURT: But isn't that the very issue that plaintiffs are pinging on as far as that issue is concerned that they're entitled to know what somebody else might have said?

MR. JACOB: I'm not quite sure --

THE COURT: In other words, as I understand it, you know, the decision of one in certain circumstances is attributed to all, even if they all didn't reach the same conclusion. And my question is, doesn't the failure to provide that information make it difficult for plaintiffs to demonstrate in that particular circumstance for that particular applicant that, you know, the physicians had a disagreement about the outcome or their conclusion and that, you know, the breadcrumbs might lead somewhere that's beneficial for plaintiffs as a result of that.

MR. JACOB: So the key point here, and we discussed this a little bit at the last hearing, but if you take a look at both -- take the combination of the paragraphs of the Vincent declaration that you've already pointed to, and then Dr. Lasater's report, this is docket 111-2. His footnote 12, at page 8 as well as table 3.3 on page 51.

So what those show the court is that in the overwhelming

majority of claims, from August of 2018 until today, we do know what the individual physician found because there was only one neutral physician assigned to evaluate the claim.

So if you take a look at footnote 12, it points out that there are 1,936 line-of-duty applications in the claims data during that period of time. 1,866 of those, 96.4 percent of them, had only one neutral physician assigned. So, we know if it was an approval, the neutral physician found the person to be disabled based on the neutral rule in 96.4 percent of those cases.

Now, to the extent that they're saying, well, there's 3-and-a-half percent that we don't know, the court is of course familiar that when you're dealing large amounts of data statistical sampling is one of the things that is often resorted to.

And the court said, hey, try to resolve things with plaintiff. So we pointed out to them that a statistically significant sample out of 1,936 line-of-duty applications would be 316. But they don't have 316, they've got 1,866 of them.

So whereas a standard, reliable statistical sample that gave you a 95 percent confidence interval would be 316 of them, their 1,866 would provide them a 99 percent confidence interval. They had a super-statistical majority with respect to line-of-duty.

With respect to T&P. If you look at footnote 12, you'll

see that 897 out of the 1,324 T&P applications had only one neutral physician assigned. So, again, the same dynamic applies, that's 67.6 percent.

A statistical sample out of 1,324 would be 298; but they have three times that, 897 of them.

So to the extent that they don't like the attribution analysis that we apply where there are multiple doctors assigned, they have a super-duper, statistical sample for each of those that they can test whether the conclusions that the statistics would lead one to. If you just take a look at the universe where we know for sure what the neutral physician found, whether those align, and they will in every single case, the statistical sample, the super-statistical sample that they can use.

And of course the final kind of benefit is the neurocognitive benefit. The court -- we have an example of a neurocognitive report that's in the record. It's attached to the Olawale summary judgment motion, and it's a Dr. Brahin, Dr. O'Rourke joint report. And that's at administrative record JO925-26.

So when a neurocognitive benefit application is put in, both a neurologist and a neuropsychologist are, in every instance, assigned to evaluate it. And they do a joint report where they make a joint recommendation based on their mutual conclusions as to whether the person should be found to be

disabled or not.

So for all of the neurocognitive ones we do know because it's a joint recommendation on behalf of the neutral physician. So there you have the entire universe where we do know what the neutral physicians recommended with respect to that application.

So that is to say -- and I'll get into the substance of the motion now -- but that's what's in the claims data for that period of time. They have all of that that their statistician can analyze.

And, notably, the court suspended, put in abeyance, the expert disclosure deadline about three weeks before their expert disclosure was due. They must have an expert who has been lined up to crunch the numbers and present statistical analysis. But they, glaringly, did not bring in any statistician or any kind of evidence to say, yeah, we can't actually crunch the numbers based on what is in that claims data. We've given them what we have with respect to the claims data.

THE COURT: Well, I don't know that -- I'm sure that that's true, but -- well, I'm not sure that that's true. But I understood it more to be to the point that we have our expert lined up and on deck and now we need the stuff that we're allowed to have to get him to crunch the numbers.

MR. JACOB: Correct. But what I'm saying is the data

that we've provided allows them to know what the outcome was of every single benefit application filed since April 1st of 2018.

They can crunch the numbers --

THE COURT: Isn't that just scratching the surface, though? I mean, in other words -- I mean, for purposes of our discussion, I don't mean to make it sound as though I've, you know, agreed. But what I'm asking you is knowing what the outcome is, in other words, the lion's share of the decisions were one-physician decisions; or, if they weren't, there's no question about what both physicians would have concluded based on what you told me.

So I understand what you're saying as far as understanding whether if there were a case where an applicant had multiple neutral-physician examinations and hypothetically, you know, two said "yes," one said "no," or two said "no," and one said "yes," that that hypothetical is so statistically anomalous that it's not fair in terms of proportionate to make defendants produce that information.

But knowing that there was only one physician who made the decision in the overwhelming majority of cases, isn't that just one minor issue that plaintiffs are urging me to look at because of what their claims are as matched up by the *Booth* factors? I have summarized that in a very, very generalized way. But, essentially, you know, each and every one of the claims requires a heck of a lot more than just knowing what the

one physician said and whether the board acted consistently with that physician?

MR. JACOB: Yes. And I'm going to walk the court through every one of the *Booth* factors because we have to look at all of the different allegations.

My point is that with respect to the allegation of neutral physician bias, that one in particular, which is, as the court has seen in the amended complaint, it's paragraph after paragraph after paragraph of alleged statistics, the basis of which they've never provided or produced.

But if it's the statistics that govern whether a neutral physician is biased or not, that they have everything of. I'll go through all of the claims letters and the review process and everything else. But for those purposes, the claims data that has already been produced, again, this is 57 fields of V3 claims data that provides for every single application since the beginning of 2018.

THE COURT: Okay.

MR. JACOB: The type of claim, the benefit type, all of the relevant dates for it, the specific neutral physicians that were assigned, what the benefit decision was and whether it was on a medical or administrative basis. So that is all that they would need in order to assess bias. Both based on -- again, I'll point the court to paragraph 112 of the amended complaint.

THE COURT: Let me get there.

MR. JACOB: Sure.

THE COURT: Okay.

MR. JACOB: You don't even have to get to the single-doctor analysis that I just described using the statistical samples to assess what is the heart of their allegation in this case.

They say there is a larger, systematic practice of providing more compensation to and more frequently retaining physicians with extremely high benefits denial rates. They focus in on the benefit denials.

And again, at the end of that paragraph, the history of these highly paid physicians' conclusions provides evidence of the systematic practice and shows that the higher a physician's compensation from defendants, the higher their tendency to render flawed or spurious medical justifications to support the denial of benefits to deserving claimants.

THE COURT: Uh-huh.

MR. JACOB: They focus on denial of benefits, and that makes sense because that's what matters at the end of the day to a claimant. Did my benefits get approved or not? And they know that with respect to every single application who were the neutral physicians who were assigned and what was the benefit outcome. And they can calculate for every single neutral physician, for all of the claims, what is the rate of that

neutral physician's association with denied benefits or not.

Of course the single doctor ones that we've pointed the court to where there are super-statistical samples available, those are the ones where the neutral physician would actually have the most power because it's just them at the end of the day. If you actually believed that the neutral physicians --

THE COURT: But absent information about the terms of retention, how could that possibly be of any note in a case?

MR. JACOB: So we have produced the contracts for all of the neutral physicians so they know the terms of retention. Maybe I should just walk through everything that's been produced.

THE COURT: That's fine.

MR. JACOB: So we've produced the neutral physician contracts, which show that they received, as the plan requires, a flat fee that does not vary based on the outcome of the examination. We have produced the neutral physician manuals, the orientation manuals that they get when they come into the program and it described what we want from them. It says we want your best professional judgment, and we don't want any bias, and you're going to get paid on a flat-fee basis.

We've produced the PRF forms. These are the forms that the neutral physicians fill out at the end, and they're required to certify at the end of that: I had no bias in this, I didn't have anything that influenced me one way or another,

other than to exercise my best professional judgment.

And we've provided the Vincent declaration, two of them, one for the Class Certification at 111-3, and one for Summary Judgment at 115-4, rather on the Motion to Compel. And he, there, describes when I'm assigning neutral physicians not only do we not have the statistics of the neutral physicians, so I couldn't do what they're suggesting that I do, which is to assign based on the benefit denial rate, but I only ever use neutral criteria. Like, the location. What's the proximity of the doctor? Are they available or not? What is their specialty? And I never use denial rates. I don't even know what they are.

THE COURT: So couldn't a conflict be demonstrated looking at it through the other end of the camera lens? In other words, it may be that Mr. Vincent does not know who they are and so he's not really, you know, no one is in a position to inappropriately assign a physician based on his denial rates. But could there not also be evidence of an inappropriate conflict by looking at continued retention or compensation of neutral physicians who tend to have a higher denial rate?

MR. JACOB: So that's one of the things that the data allows them to calculate. The court can see it is calculated in the Lasater declaration. If they want to contest that and do it differently they can. But they know for every single

neutral physician exactly how many times they got assignments.

THE COURT: Okay.

MR. JACOB: So not only can they calculate their denial rate, and not only can they know what their individual recommendation was in the overwhelming number of cases, but they know exactly how many times they were assigned examinations, and they know that for every single year.

And what you can see in the Lasater report, and again I know this is on the merits, but what it shows is there is no skew. The fourth quartile for every benefit type of the neutral physicians who are most frequently assigned to evaluate each type of benefit have the lowest denial rate. And the first quartile for almost all of them has the highest denial rate, so the ones who are least frequently assigned to evaluate claims. They can contest those statistics. They can try --

THE COURT: I suspect they're going to try to.

MR. JACOB: But the point is, they have all of the information in the claims data that you would need to explore that hypothesis. They don't need the underlying claims records. I am --

THE COURT: Well, they may not for that point. I'll go with you there hypothetically. But, I mean, there's so much more that they're seeking to demonstrate.

MR. JACOB: Yes. And the other thing that I want to point out, two things, and then I'll get into where I was

intending to start the argument.

There are in the record in this case already -- as the court knows we produced everything for the named plaintiffs. That's more than a hundred evaluations by neutral physicians. They, themselves, also produced 1,361 of them. So there are, in the record, about 1,500 sets of underlying documents, the evaluations for these things, hundreds of decision letters. To the extent that -- I'll get into this as I go through the *Booth* factors. It is not going to serve the court's interests or the parties' interests to take a record that already has 1,500 of the underlying records and expand that out by 20,000 more in terms of trying to evaluate these claims.

And I'll walk that through, but I think it's important because I don't think that their briefing in any way acknowledged the sheer number of evaluations that they already have in their possession, if they wanted to try to make these cases of a pattern or practice.

So, with that, let me get to what I wanted to say on the Motion to Compel itself. So I'm going to cover three points in order.

First, no court has ever ordered the scope of extra record discovery in an ERISA case that plaintiffs are seeking through this Motion to Compel. And that's largely because, as plaintiffs admit in their briefing, ERISA has uniquely tighter discovery standards.

Second, I'm going to describe -- and I'll summarize this when I get to it because we've covered this to a substantial extent, but the substantial extra record discovery plaintiffs already have because we've already produced it. And I'm going to walk the court through the court decisions to show that it already goes to the outer bounds of what those courts have permitted.

And third, I'm going to walk through each of the five *Booth* factors that plaintiff invoked one by one and show how the court has everything it needs to conduct the full assessment.

So, first the case law. So it's black-letter law in the Fourth Circuit, this is the *Wilkinson* case and this is the *Helton* case, that in a case that hinges on ERISA benefit denials as this case does -- you have nine named plaintiffs, each of whom are contesting their benefit denial, and then they try to throw some glue together to stitch them together but it's all about the benefit claims -- discovery is presumptively limited to the administrative record.

And the Supreme Court explained why in the *Conkright* decision. They said that the administrative and the litigation costs, if we allow full-blown discovery under just a normal Rule 26 standard, it would overwhelm plans and because these are voluntary plans, employers just wouldn't offer them if we didn't have the expedited procedures that ERISA provides. And

the *Helton* case in the Fourth Circuit again says we want expedited, efficient, and inexpensive resolution of claims.

THE COURT: Well, that's why the default is the default. But it goes on to say a lot more than just that.

MR. JACOB: It does, Your Honor. Then we go -- so how do you get beyond the administrative record? Under what circumstances? I'm going to refer only to the cases that the plaintiff cites with respect to this.

So the *Balkin* case, which they cited several times in their presentation says: The burden is on plaintiffs to get beyond the administrative record and it is to show "particularized facts," that's the phrasing of *Balkin*, the *Clark* decision says the "factual basis," that demonstrates evidence needing to assess either a structural conflict or a specific gap in the administrative record.

And plaintiffs acknowledge this. Again, it's page 4 of their Motion to Extend Deadlines Reply. They say, quote, "In ERISA cases, the completeness of the administrative records informs the scope of discovery."

And in Mr. Barnett's declaration, paragraph 7 at ECF-137-1, he said, "Counsel for plaintiffs were well aware of decisional law in ERISA litigation that imposes initial limits on discovery to information relevant to their claims missing from the administrative record or gaps in the record required to fully and properly evaluate the claimed and wrongful

conduct."

So the first defense exhibit that I believe was handed to you before is, it's just a quick summary of the cases cited by both parties with respect to extra record discovery in this case.

So plaintiffs' own cases start -- so the first two pages are sort of what I would call the majority of decisions, 12 of them. Half of them in this district, a Fourth Circuit decision, a Third Circuit decision, and several -- a few other out-of-district Fourth Circuit decisions and a few out-of-circuit authorities that have denied discovery of this kind outright.

The third and fourth page --

THE COURT: Can you address Mr. Barnett's assertion that the cases which you relied chiefly are inapposite because they do not reflect the sorts of claims at issue here.

MR. JACOB: So, again, so we agree that most of the cases that have denied discovery did not have fiduciary breach claims included. However, again, we have gone to the outer bounds of what was permitted by the cases that they cited. And among their cases, there were fiduciary breach claims; in the *Chavis* case, the *Chughtai* case; the *Kane* case initially had them, they were dismissed along the way; the *Caplan* case; the *Cloud* case had three claims in it in addition to the benefit claim as well as a full and fair review claim.

And none of those cases allowed the kind of discovery that they're seeking here, which is the wholesale production of all of the underlying claims records. That's never happened. Not in any of the ERISA case, not in any of the cases that they've cited.

That's in part because plaintiffs' own cases acknowledge that courts are required to apply very careful scrutiny when taking look at their asserted needs: The *Chughtai* case, the *Balkin* case both use those terms, "very careful scrutiny." And an extra record discovery has to be limited to narrow circumstances, and that's the *Chavis* case, and must be tailored to the unidentified gap.

In the *Chavis* case, for example, broad requests for discovery as to the entire plan were denied. And only discovery was allowed as to a very narrow category of similarly situated participants who initially had been granted benefits and later those benefits were suspended. Only that fact pattern was allowed. All others were denied.

Similarly, the *Kane* case that they cite expressly denied all discovery that was unrelated to the structural conflict. So we're going to look into the structural conflict but we're not going to look into anything else.

And *Clark*, which is really the seminal case in this district. It is a decision by Judge Bredar. It's cited in the *Balkin*, the *Chughtai*, and the *Kane* decisions that they rely on,

establishes that the standard is that a court needs to, where there has already been a substantial production of the evidence in the case, as there has in this one, the court needs to weigh the asserted need against the record of what has already been produced. They've got to identify the gaps across that record.

And in that particular case, Judge Bredar said the defendant has come in and presented all of these different indicia of neutrality and the plaintiffs have not adequately assessed that or shown what additional steps would allow me to conclude that the plan had not been neutral.

And on claims data, although this isn't one of the extra record discovery cases they cite, they rely a lot in their briefing in the Ninth Circuit's *Demer* decision.

If you take a look at note 8 in that decision where there were all of these allegations of bias, the Ninth Circuit said, well, what the defendant could have done to stave off where we went with this would have been to produce the underlying data to show that there wasn't the kind of skew that they're asserting. That's precisely what we've done here.

So that frame is an important part of the factual background that this court needs to look at in assessing is what is already produced adequate. I'll walk through that as we go through the *Booth* factors.

As the court takes a look at the chart, what it can see is where statistical and compensation discovery of third-party

reviewers, retained third parties has been denied. The *Abromitis* case from the Fourth Circuit denied it. The *Reichard* case from the Third Circuit denied it. And the *Reichard* case in particular makes a very important point; the *Zahariev* case that we cite makes a similar point; and it goes to a comment that Your Honor made when talking to plaintiffs during their argument about mini-trials within trials.

THE COURT: But part of the citation of the *Abromitis* case, just to bring you back to that, that's somewhat problematic because the language, you know, the language of the court there would seem to sort of, in some measure, block what plaintiffs are seeking here, I don't disagree with you, except when you compare it against what is the essential evidence for that plaintiff to prove that case versus the essential evidence for these plaintiffs to prove this case, it's not on all fours.

I mean, I appreciate, you know, the issue of information that's sought has to do with whether the fiduciary made a decision in violation of duties, not a contractor, and I understand that. But that's -- the reason that that is sort of a -- is inapplicable here is because that fails to address the very nature of evidence that's essential for the plaintiffs here to demonstrate what they're called upon to prove.

MR. JACOB: So, again, the allegation there -- and I think what the Fourth Circuit was responding to was the bias allegation.

THE COURT: Right.

MR. JACOB: And the Fourth Circuit said, in this circuit we don't look at whether the independent reviewer was biased or not --

THE COURT: We look at the fiduciary.

MR. JACOB: We look at the fiduciary. Here, that's the board. All of this discovery is not aimed at looking at the board. If you're looking at the board, what you would look at would be does the claims data show a skew in the assignments.

THE COURT: Well, but they are looking at the board in terms of was the full record reviewed? Did they review what they were supposed to? Those sorts of things. So I don't know that I'm with you on that.

MR. JACOB: Well, then again, I'm going to go through the *Booth* factors one by one.

THE COURT: Okay.

MR. JACOB: I know that that's important. Just the last thing I want to --

THE COURT: Yes.

MR. JACOB: -- to leave the court with in that record. *Abromitis*, what the *Reichard* court says is one of the reasons that we don't do these statistical analyses on third-party reviewers is because there isn't a platonic ideal on what the right rate is of approving or denying claims. It's only

relevant if the number that was approved is wrong. And the only way the court is ever going to be able to figure that out is if it conducts a mini-trial on each individual claim that that third-party reviewer reviewed and determine is the batting average wrong or not.

If the court could imagine, for example, it's probably of no surprise to the court when a case gets assigned to a district judge, defense counsel, one of the things they might early on do is say, what percentage of the time does that judge grant a motion to dismiss? For some judges it's 25 percent of the time, for some judges it's 5 percent of the time. But neither of those is right or wrong. It depends upon the merits of the individual cases that that particular judge received, and it depends upon some cases judgment calls.

THE COURT: Might you not also conclude that a judge who grants 95 percent of motions to dismiss might be making more errors than a judge who's more middle-of-the-road on her statistics?

MR. JACOB: So there have been, again, a few cases that have allowed discovery into an individual on that basis. So, but the theory of this complaint is not we need to find the outliers, we need to find the bad judges who do too few or too many. The theory is that the plan knows who they are, and it is deliberately assigning claims to particular ones in order to have them approved or denied. The claims data that is already

produced allows for full assessment of that theory.

THE COURT: I hear you. I understand you to say that you acknowledge the other stuff that they're claiming but that that, on your read, is their chief, loudest complaint in terms of the basis of their claim?

MR. JACOB: Yes. Yes, Your Honor.

THE COURT: I understand.

MR. JACOB: And the other thing, if you look at the chart, pages 3 and 4, their cases. The other thing that stands out is even the cases that have allowed some kind of extra record discovery. So in this district the *Balkin* case, the *Chavis* case, the *Chughtai* case, the discovery was limited to interrogatory responses that provided the batting average for a couple of specific doctors. That was it. Take a look at your claims data and fill out the interrogatory that gives them the numbers. We've already done that by giving them all of the claims data from April 2018 forward. So they will have those batting averages that they can calculate.

But they did not order the production of the underlying claims records. The only cases that ordered any underlying claims records were *Cloud*, as they've pointed out. *Cloud* was limited to a production of underlying claims records for similarly situated claimants that had the terms "changed circumstances" or "clear and convincing" applied to it.

THE COURT: Because that was relevant in that case.

MR. JACOB: Because it was specific to that particular case.

And similarly, the *Adams* case that they cite to. It's an out-of-district case. It doesn't talk about ERISA limitations on discovery at all, and it ordered seven reports produced. That does not at all help them with respect to this; and, in fact, denied a broader request for 530 reports associated with the people.

So here what we're dealing with is a sweeping request for all of the underlying documents underneath the claims data.

Now let me fulfill my promise to go through the *Booth* factors because the court keeps asking that question and I think it's fair enough.

So I'm going to address *Booth* factor 8 first. I think all of their factors, they raise five of them, factors 8, 4, 6, 3 and 5. Eight and 6 both include or concentrate on the bias question. And then most of the other ones deal with these pattern or practice-type allegations across the body of evidence.

So with respect to *Booth* factor 8, assessing bias or conflict. Again, I've already demonstrated that the evidence that we produced would allow you to calculate -- with respect to the board, which *Abromitis* tells you is the relevant inquiry, these additional documents won't help them at all.

But, if what we were doing is assessing bias of individual

neutral physicians and if we rejected *Reichard's* observation that the batting averages shouldn't matter without underlying assessments, they can already do those assessments based on the statistics presented.

I particularly want to walk the court through. So at page 16 of their brief they have a list of the things that they say they need.

THE COURT: Let me get there because I have 10,000 documents in front of me. Bear with me a second. In their opening brief?

MR. JACOB: Yes, Your Honor. Their opening brief, page 16.

THE COURT: Okay.

MR. JACOB: So they say -- and again it's the only full paragraph on the page. They say, "The informational gaps that we need to assess the bias are, 1) which plan-compensated physicians were selected and compensated by defendants to evaluate other claimants."

That is already all in the claims data. I'll note that they say that they don't have all the compensation information that they want. I'll point the court in that regard, we produced the form 5500s, as did they, and I'll note that they, in their own reply brief on the Motion to Extend, on page 3, say that the form 5500s, quote, "Reflect the compensation paid neutral physicians by defendants that's alleged in defendant

complaint." So they, themselves, identify those as a sufficient source of compensation.

There is detailed compensation information, business expenses, that sort of thing, that is housed in a different part of V3. That's not what is at issue in this motion. If they want to have a later motion about whether the 5500s are adequate on the compensation front or whether they need underlying itemized data that's in V3, we can have that discussion then. But these underlying claims records that they're seeking today, none of that is going to provide additional compensation information to the court.

The second thing that they say they need is: Each evaluating plan-selected physicians' conclusions as to whether other claimants met the line-of-duty T&P or NC benefit standards. Again, I've already explained how we know that for the overwhelming number of the neutral physicians and a super-statistical majority of them.

Third, they say they need: Defendants' pattern and practice decision letters --

THE COURT: Let me take you back to the second feature, about each evaluating plan-selected physicians conclusions. I understand what you're saying about that point. There's a second phrase to that sentence, or fragment, "including any knowing use of or reliance on inconsistencies with plan terms by plan physicians or other inadequacies in

their reports."

Do you contend that the documents you've already produced give them that?

MR. JACOB: So, I have two contentions with respect to that. So they have about 1,500 evaluations to use, to piece together their allegations that there are inconsistencies among those reports.

Let me start now to sort of go through these allegations that they have --

THE COURT: Can you answer my question directly though? Do you contend that the information you've already produced satisfies their request on the second portion of number two?

MR. JACOB: So I do contend that the record that they have is wholly adequate to assess whether there was a pattern or practice of that.

THE COURT: That's not my question.

MR. JACOB: Yes.

THE COURT: My question is whether you contend that the documents that you already produced satisfy their request for the second part of number two: Including any knowing use of or reliance on inconsistencies with plan terms by plan physicians or other inadequacies in their reports.

So I'm not asking whether you think they have enough to prove their case. I'm asking whether you take the position

that you produced documents that would satisfy that request?

MR. JACOB: No, Your Honor. Their request is for 20,000 documents so they can evaluate all of those --

THE COURT: Can you answer my question?

MR. JACOB: So no.

THE COURT: Okay.

MR. JACOB: Yes.

THE COURT: All right.

MR. JACOB: Because they, again, so their request is for every claim decided by the plan and every neutral physician report since April 2018, so . . .

THE COURT: Have you produced that subset or descriptive documentation for the claimants here?

MR. JACOB: Yes, for every one of them we have produced --

THE COURT: The whole thing?

MR. JACOB: Again, that's more than --

THE COURT: Yeah, you've told me.

MR. JACOB: It's 68 decision letters and more than 100 PRFs and narratives. So for every single one, every single evaluation that applied to them, that has already been produced.

THE COURT: Let me ask you one question before you proceed, and I'm prepared to ask Mr. Barnett this question as well. But in the cases where there have been orders for the

defense to produce extra administrative record documentation, we talked earlier about the fact that in those cases the judges narrowly tailored those orders to similarly situated claimants, et cetera, et cetera.

Do you agree that this case is somewhat of an ill-fit for that sort of narrow tailoring?

MR. JACOB: No, I do not.

THE COURT: Okay. Tell me why?

MR. JACOB: For two reasons: First, if the notion is that if plaintiffs can come in and allege that there are inconsistencies across six years that a plan or reviewer of claims is then required to produce every underlying record for that entire period of time -- and I represented United Healthcare, it would be a million claims every month. The production would be limitless based on that.

THE COURT: So I hear you on that. But let's just assume, you know, this is not a fishing expedition. Let's assume that I'm satisfied that they've demonstrated, generally -- and this is a hypothetical, please understand that -- that they have demonstrated for each of the categories of documents that they're seeking that there is something in the actual record here that is smoke and they claim there's fire. And so they think that there's some sort of particularized need that's been articulated and supported by what has already been.

So, in other words, they're not just anybody can sue anybody for anything on that level, but that there's some legitimate cry for that information and for the claim and the accusation and the allegations. So just buy into that with me. That the nature of this claim isn't about a particularized kind of injury or -- obviously it's not Mr. Cloud, or it's not one claimant. Rather, it's a description of a class and subclasses that is not constrained by the kind of injury that that person asserts he suffered.

In other words, it's not constrained to a change of -- a change of circumstances, for example; but rather it's an allegation of a more overarching fraud scheme.

So I'm trying to understand how, in this instance, would a court narrowly tailor extra administrative record discovery in the way that other courts have and that you say, if I ever were to I should here.

MR. JACOB: Right. So, first, the fraud allegation is the skewing of assignments. Claims data, we produced everything that you could want. Basically everything that we have to evaluate that is sufficient for an evaluation.

With respect to the other items, let me go through their set of alleged inconsistencies. So they summarize these -- let me see. It's in their reply brief at page 7. They have eight bullets. And they went through these with the court in their presentation.

They've got eight bullets, and they say, here's our demonstration, Court, that this is a plan that is inconsistently applying plan terms and we want additional discovery. So I want to frame this by saying, to the extent the court is convinced by any of these examples that they come forward with, the correct thing to do would be to limit any extra record discovery allowed to the specific places where they have made a demonstration. It wouldn't be to produce everything across 20,000 documents, most of which have nothing to do with the demonstrated inconsistencies.

But I want to walk the court through because, in fact, there are no demonstrated inconsistencies from the record that they've put in front of the court when you actually look at the complaint paragraphs they cite to and the evidence that they attached for the court.

And I will note in this regard that they rely a lot on the *Cloud* case. In the *Cloud* case, there was, as the court knows, some targeted production of decision letters on changed circumstances and on clear and convincing.

This is what the Fifth Circuit ultimately found when it took a look at what came out of that process. It found, quote, "The variations identified by the district court are not significant and *Cloud* doesn't show how he can meet the standard for changed circumstances under any of those definitions anyway."

And the court ultimately concludes that the plan's interpretation of the term was reasonable. And all of that underlying discovery to identify minor variations in the way that those terms had been defined amounted to nothing because at the end of the day the Fifth Circuit said the decision as applied to Mr. Cloud, quote, "was a reasonable and fair reading of the phrase." And that is what the decision would ultimately be to the court in each instance. The court would look and say is that a reasonable reading of the phrase --

THE COURT: But that doesn't mean that her decision to grant extra record discovery was ill-founded. It means they disagreed with her on the ultimate merits issue.

MR. JACOB: Again, what I'm -- the only point I'm trying to impress upon Your Honor --

THE COURT: Yeah.

MR. JACOB: -- is that that is not an example of material inconsistent application of plan terms. The ultimate determination by the Fifth Circuit Court of Appeals was not a significant inconsistent --

THE COURT: But they're not impugning her decision to explore it. They're disagreeing with the outcome.

MR. JACOB: Well, I will say, they reversed her decision on a grounds that basically the application of that term meant that all of the discovery that was ordered in that case, because she made an error of law as to that, all that

discovery was completely unnecessary. It was unrelated to the key legal issue in the case.

That said, I don't disagree, the Fifth Circuit wasn't reviewing the discovery decision.

THE COURT: Yeah.

MR. JACOB: Again, the point --

THE COURT: I hear you.

MR. JACOB: All I want the court to take away from it is *Cloud* is not an example of a federal court finding that this plan has inconsistently applied the plan terms.

THE COURT: I understand that.

MR. JACOB: Quite the opposite.

THE COURT: I understand that.

MR. JACOB: So let me go through each of the eight bullets. Again, page 7 and 8 of the reply. Purported inconsistency number one, they say: Plan terms within the definition of neutral physician including, quote, "adequate determination," and, quote, "maintain a network."

Then they point the court to a series of amended complaint paragraphs. None of these identify any inconsistent application of the term "maintain a network" at all, although they purport to be demonstrating that here.

And with respect to adequate determination, not only do none of the complaint paragraphs show an inconsistent application of that term, they don't even purport to show two

instances in which the court applied the term "adequate determination" and to say that they're different.

All they do in their reply brief is identify Exhibit E, which is a McKenzie evaluation. And they just say the court relied on even though it's not adequate. That is not a remote demonstration. They don't say how it was inadequate. They don't show any misapplication of that plan term. That is not an example of inconsistent application of plan terms or inconsistent treatment. It's just a generalized allegation that this plan accepts neutral physician reports that are inadequate.

Their second point they say, they point to the plan's total and permanent general standard including the plan terms, quote, "substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit," and, quote, "educational level and prior training of a player will not be considered in determining whether such player's T&P disabled."

With respect to the first of those, substantially prevented from or substantially unable to engage in any occupation, they do not point to any examples at all of that term having been inconsistently applied by the board or by neutral physicians.

The only thing that comes close to that is they point to paragraph 179 where they say that Dr. [redacted] acknowledged in

her report, that, quote, "It is not likely that Mr. [redacted] would be able to maintain employment" and yet ultimately found that he was not disabled. They're essentially alleging that that neutral physician was acting inconsistent with their own conclusion.

But if you actually take a look at Dr. [redacted]'s report that they point to, there's not even an internal inconsistency.

Dr. [redacted] found, quote, "At this time, based on his fragile psychological state, it is not likely that he would be able to maintain employment." That phrase, "at this time," is not a finding that this person is totally and permanently unable to find employment over a prolonged period of time.

So goes on to say that, quote, "Due to low scores on all performance validity measures, it is not possible to make a determination at this time. However, there are psychiatric concerns that require Mr. [redacted] get psychiatric treatment and care," and recommends further evaluation.

So there isn't even an internal inconsistency with respect to this neutral physician. All of this would be reviewed by the court in a summary judgment context. But certainly this is not an example of an inconsistent application of a plan term. The plan term isn't even quoted in the neutral physician report with respect to this particular point that they point to.

And the second one, and they made much of this in their presentation to the court, is about education level. There,

they point to paragraphs 168, paragraph 188, and paragraph 225 of the complaint. And in each instance, all they point to is a neutral physician who states at the end of the report that this person could perform -- because there's a place on the form, they're supposed to fill out what work could they perform. And the neutral physician says, "They could perform work consistent with their education and training." That is not the use of education to determine whether the person is disabled or not. And they, glaringly, don't point to anything in the internals of those evaluations, all of which they had before they filed a complaint, that is a use of the education of a person to find that the person is not disabled.

So that's the second one. No demonstration of any inconsistent application.

Purported inconsistency number three. They say, "plan terms for line-of-duty points." When you look, here they point to paragraphs of the complaint, but ultimately they attach Exhibits H, I, and J. And they say that these neutral physician evaluations demonstrate inconsistent determinations of whether a particular injury is worthy of points or not.

If the court takes a look at H, I, and J, the court will find that that's not the case.

So with respect to Dr. [redacted], his evaluation of [redacted] in Exhibit J. Dr. [redacted] says, you know, their allegation of inconsistency is that he found joint inflammation but failed to

award points for it. Well, if you take a look at the PRF, which again is attached to Exhibit H, Dr. [redacted] says he, quote, "had joint inflammation which resolved four days later."

So that would, again, not be an indication of long-term disability which is what he would have had to find. There's no internal inconsistency with him not awarding points in that instance.

With respect to Exhibit I. This is Dr. [redacted]'s examination of Mr. [redacted]. Here, they say there was a failure to award points because he was able to play after the injury while he was in the NFL while another doctor did award points in Exhibit J, Dr. Selesnick did award points even though the person was able to later play in the NFL.

If the court looks at Exhibit I, what the court will find is that what Dr. [redacted] said is, quote, "He does have a right knee MCL injury sustained while playing football in the NFL. However, on examination, the most-recent MRI in 2020 did not mention any MCL pathology and Mr. [redacted] was able to play after the injury while in the NFL. This does not constitute systemic instability."

So three reasons are cited. It's not just that he was able to play after the fact. He's got minimal laxity and nothing is showing up on the MCL report today. That is not any kind of inconsistency with Dr. Selesnick's report. They're just discreet medical judgments based on medical evidence.

That is not anything that warrants 20,000 documents produced to see if we can find additional alleged instances of misapplication of the line-of-duty standards.

The next one, purported inconsistency number four. They say: Planned terms describing NC benefit standard for mild and moderate impairments include in it impairments, quote, "reflect acquired brain dysfunction."

The court will note that they do not cite any evidence, even though they've got 1,500 evaluations to rely on, they don't cite anything. All they rely on is paragraphs from their complaint.

The only paragraphs that they do cite to that could potentially be relevant to this, none of them show an inconsistent application of the terms "reflect acquired brain dysfunction." But they cite one at paragraph 1 of 53 where they vaguely allege that several of Mr. [redacted]'s test scores were described by other board physicians for other players as showing mild impairments. They don't say who. They don't present the examples. We don't know what they're talking about in that regard.

If they have examples of that happening, it would be their duty -- again, the burden is on plaintiffs, that's *Balkin*, that's *Clark* -- for them to come forward and show the specific thing that warrants getting to the extra record discovery. They have not done that with this vague allegation about

Mr. [redacted].

Then in paragraphs 251 through 55, they have several allegations about Mr. [redacted]. The first of those in 251 is Dr. [redacted]. They say: Although his testing for Plaintiff [redacted] demonstrated the presence of at least a mild cognitive impairment, Dr. [redacted] found no cognitive impairment.

This is an allegation essentially that this neutral physician was inconsistent with himself, that would be evaluated by the court in summary judgment on Mr. [redacted]'s application.

But, if the court actually looks at Mr. Murphy's evaluation -- Dr. [redacted]'s evaluation -- the answer is in there because he says: Mr. [redacted] presented with, quote, "cognitive complaints involving mainly memory, organization, attendance to the task," but notes that Mr. [redacted] has, quote, "employed a number of pneumonic techniques to compensate and has good support assistance from his wife." Dr. [redacted] also noted that, quote, "diet and positive attitude and understanding his deficits have helped him to handle it," and on the basis of all those things, quote, "do not rise to the level of a neurocognitive disorder."

There are several things cited by Dr. [redacted] to justify the decision. The court can evaluate those on summary judgment, but this is not an example of inconsistent application of plan terms.

The same is true of paragraph 253, which is the examination of Dr. [redacted]. They say that Dr. [redacted] concluded that there was no evidence of cognitive impairment, even though his score testing, quote, "could be consistent with mild cognitive impairment."

Now, if you take a look at the underlying record, the answer is in there. Dr. [redacted] did just say that in a single sentence. Dr. [redacted] explained, yes, it could be consistent with mild cognitive impairment, but, quote, "there were many inconsistencies during Mr. [redacted]'s neuropsychological testing," which make him question the accuracy of the diagnosis and, quote, "scoring a 24 out of 30 on the MOCA," which could be consistent with mild and cognitive impairment, but Mr. [redacted], quote, "had no other deficiencies on exam."

Again, you might dig into whether that conclusion was ultimately supportable under an abuse of discretion review for the board's determination to accept it but it is not an inconsistent application of plan terms.

And this, again, just recurs in example after example in these paragraphs that they cite. They don't support -- they don't attach any of the underlying evaluations for these. They just give the court a tiny snippet and don't present an actual inconsistent application of anything.

Purported inconsistency number five. They say, the plan terms for the active and inactive categories of T&P disability

as well as the special rules in plan section 3.5. They attach no evidence. None of the evaluations at all. They cite only to paragraphs of the complaint. They don't cite any alleged inconsistent application of the special rules in plan 3.5. And the only thing in these paragraphs that even comes remotely close to being an alleged inconsistent application of active and inactive categories, paragraph 193, quote, "Contrary to the plan's terms and omitted from the decision letter was the clandestine interpretation that the board has applied," which they say is that active benefits are only given to players for a catastrophic injury, such as a paralyzing collision during a game.

They take that from testimony from *Cloud*, from Trustee Smith, which they misquote and take out of context. If the court actually was to look at the testimony of Trustee Smith in that case, he was merely giving an example of the kind of injury that could qualify for active benefits. He doesn't use the word "only," he doesn't use the word "sole." And, in fact, it's quite obvious that this plan does not apply any such limitation. They don't cite to a single decision letter which says, "You didn't suffer a catastrophic injury, therefore you don't qualify for plan benefits."

Again, no demonstration of inconsistent application of plan terms.

And paragraph 284, they say defendants unreasonably

interpreted the plan to ignore consideration of whether a player is T&P disabled from the cumulative impact and effect of his impairments. They cite no examples at all of inconsistency in that regard.

In fact, if anything, if the court reads the complaint, the real allegation is the court consistently fails to assess cumulative impact in the pending Summary Judgment Motions that we have filed where a plaintiff alleges, "Hey, I had alleged a cumulative impact, and they didn't assess it." There's no inconsistency in the application of any plan term there. Nor do any of the plaintiffs who say my cumulative impact was ignored have a single doctor of any kind who presented evidence that said, "Yeah, you did have a cumulative disability and the plan ignored it."

So, again, not an example of inconsistent application of plan terms. And their own allegation is that is consistently misapplied.

Inconsistency number seven. They say, plan terms concerning what documents and information defendants must review. They said there was inconsistent application.

They cite only to paragraphs in the complaint. They provide no examples of this. And this is another place where, again, the actual key allegation here is an alleged consistency. According to them, never do all of the underlying records get reviewed. In fact, what I would refer the court to

is the evidence that has been put in, which is the declaration of Trustee Smith and the declaration of two party advisors.

So, I think as the court is aware, one of the reasons that court after court after court has determined that this plan does not have a structural conflict is because the board is equally composed of three members of management and three members of the players' association, all of whom are former players, and who want to make sure that they're conscientiously discharging their duty to make sure that people get benefits where they deserve it. That's what Trustee Smith says.

I'll note, we offered depositions of all these people. Some of those depositions were scheduled and others were offered. They pulled them all down rather than proceed with them prior to this hearing. Said, oh, deadlines were held in abeyance so let's not develop any more evidence about whether the underlying record that's established here --

THE COURT: Well, because certainly it would aid those depositions if they had the documents they're asking for me to produce. I can't fault them for that.

MR. JACOB: Well, I don't -- I'm, again, if I'm going to have to prepare a witness on 20,000 underlying evaluations --

THE COURT: I'm not quarreling with you about, you know, I'm just saying pulling them down, you know, they're waiting for me to render a decision that will materially alter

the trajectory of the case. I can't say that I quarrel with their decision to hold off.

MR. JACOB: Fair enough, Your Honor. But, again, the point is that on this their depositions of the party advisors or of Smith, I mean, they can't quiz them on 20,000 different evaluations.

THE COURT: Yeah, yeah, I hear you. I understand.

MR. JACOB: And they've got all of the ones for the named plaintiffs already. And the key point here is that what Trustee Smith and the party advisors explained -- and the party advisor are not Grimm, it's not the law firm. The *Cloud* case, in fact, was quite incorrect about this particular conclusion, as the evidence in this case will show.

Both the management side and the players' association side have a party advisor who the declarations say: I review every page of those records and I then make recommendations, the trustees quiz me about them, we have a back and forth, and that's how we get to the final determinations.

And the trustees say: I review the parts of the record that I need to in order to understand the recommendations. And there we go.

But, again, this is not an allegation of any inconsistency. And it's inconceivable that producing 20,000 underlying evaluations is going to add one iota to the corpus of evidence that the court will ultimately use to assess

whether they are indeed reviewing the records or not.

The records, as they've pointed out, all of them consistently say, your records were reviewed. That's what all of the claim records -- again, they've got a thousand five hundred of these. It's not as though there's inconsistency among them on that point.

What it's all going to come down to does the court credit Trustee Smith and the party advisors that the trustees have delegated the responsibility to make sure that everything is reviewed. And the neutral physicians as well certify that they review all of the medical records that were submitted to them. That's a certification on the form.

So you've got the neutral physicians certifying that they've reviewed everything. It's a certification on every single one of those 1,500 evaluations that's in the record. Then it goes -- those get submitted in at the committee level, the party advisors are not there. I know that they said a lot about needing to make sure that the committee has different advisors.

Again, what the record shows here is Groom will create a factual summary, that just summarizes the facts, but it's only the party advisors that present any kind of recommendation. They're the ones that review all of the pages of the record at the board level. The party advisors do not participate at all at the committee level. It's in the declarations that are

before the court.

And, again, we offered their depositions because we fully agreed, to the extent that the process on that is important to the resolution of the claim, you need to talk to the people who can say, "Do we regularly review them or not?" But 20,000 additional documents beyond the 1,500 that are already in is not going to help the court assess whether or not the representations in all of those letters that the records were reviewed are true or not. You need to talk to the people who are making the representations.

Finally, their last purported inconsistency, their last bullet is: Inconsistent and discriminatory treatment of similarly situated players based on race. This was the Heaton norming issue that they discussed with the court at length.

So, first of all, they point to their footnote 6 where they describe what the Heaton norms are, demographically corrected or adjusted and take into account such factors as race, age, gender, and educational level.

So here's what the record on this will ultimately show. So, as the court can tell from the fact that these are called the Heaton norms, this is an available body of testing adjustments that many neutral physicians or many just physicians who practice generally may or may not apply depending on what their professional judgment is.

And prior to 2021, there was no position that the plan

ever took as to whether you should apply Heaton norms or not. The individual neutral physicians were exercising their own professional judgment as to how to do the test scoring.

THE COURT: Is it accurate though that the Heaton norms also include factors that are, on their own, disallowed by DOL, that has been interpreted to be disallowed?

MR. JACOB: So I was the solicitor in the Labor Department, and I am not aware of any instance in which the Labor Department has said that you're not allowed to make standardized adjustments based on --

THE COURT: I guess what I'm asking is, like, is it correct that it has been incorporated into the statute that issues or factors such as race should not be considered?

MR. JACOB: So it's a more complex answer than that.

THE COURT: I'm sure.

MR. JACOB: So you should obviously not consider race in determining whether a human being is disabled --

THE COURT: Right.

MR. JACOB: -- well, I would have determined that you were disabled but because you are Caucasian I'm going to say you are not. That would obviously be improper and prohibited by the rules. I don't think that there's anything in the rules that say that demographic adjustments are not permitted. But one of the key --

THE COURT: Because they're considered predictive in

determining whether somebody has a T&P?

MR. JACOB: And often -- yes, Your Honor. And often in a way that's designed to just bring things down as much as possible to the level of the individual in front of you and to take into account factors that they had standardized information they could take into place.

But I think the key point here is, the plan did, in the middle of 2021, when they became aware that this practice existed, issue a directive that hence forward, without regard to whether Heaton norms have merit or not, we just don't want to deal with this issue being raised by people and anybody thinking that we're doing anything --

THE COURT: Yeah, it's not a good look.

MR. JACOB: Yeah, so they stopped it at that point. And they issued a directive. And they don't present a single instance of a neutral physician who after the middle of 2021, when that directive was answered, acting inconsistent with the plan.

THE COURT: Okay.

MR. JACOB: Nor do they point to any plan term that would have been inconsistent for a neutral physician to exercise their best professional judgment prior to that point in time in deciding whether to use --

THE COURT: Okay, got it.

MR. JACOB: So, again, it is not an example of an

inconsistency of application. And those are all eight of their examples.

So when the court asked me, you know, isn't this -- you know, shouldn't narrow tailoring apply in a case like this --

THE COURT: Well, what I was asking you is how would that occur in a case like this. And I understand your explanation for why you really couldn't answer that question directly.

MR. JACOB: Yes, Your Honor. And I do think any one of these individual plaintiffs -- what they've tried to do here is, this is a sweeping motion that asks for all 20,000 records, everything from middle of 2018 to -- give us all 20,000 of those, which of course is going to necessitate then the court evaluating, every claim that they make based on this set of 20,000 records is going to be something that is a contested issue before the court. And we will be here for 20 years going through 20,000 documents to figure out, is this one actually inconsistent with this one, et cetera, because none of this is targeted. If they have specific targeted complaints -- and, again, I wanted to walk the court through the ones that they purport to present as targeted claims --

THE COURT: I'm here.

MR. JACOB: -- none of which I think would warrant doing any kind of targeted discovery because they don't point to an alleged inconsistent application of a plan term that has

any basis, particularly where they've got 1,500 records to draw that from.

So let me walk through the rest of their *Booth* factor allegations. Actually, I pointed the court to page 16 where they say: Here are the things that we need in order to assess bias. I've covered the third one there, which is the alleged pattern or practice in decision letters and how that's not going to be held.

The next one they say: We need the dates of other claimants' physician evaluations. That's all in the claims data.

The next one, number five, they say: We need the plan physicians' alleged relevant specialties and expertise. All in the claims data.

The next one, number six, they say: Whether defendants disregarded evidence in favor of plan-selected physicians' opinions. That, again, they've got 1,500 examples out there, if they want to come to the court -- in fact, in every single one of these -- and the court can see this in the three MSJs that have been filed -- every single time the allegation is going to be, hey, I had other evidence here that you disregarded. And the court is going to have to make a determination on every one of those under an abuse of discretion standard, did the board make, you know, abuse its discretion in accepting these neutral physician reports as

adequate evidence to support the determination or not. Every single one of those times, the court is going to have to look at the underlying record. And the court can see that from seeing how the summary judgments get written out. Each of them have individual complaints about specific alleged inconsistencies, but adding 20,000 documents into the record, beyond the 1,500 that are already in there, is not going to add anything and is just going to render this case completely unmanageable.

THE COURT: So I think -- I don't mean to sound dense, but I think what I hear you saying on this particular issue alone, is that if there is such a -- I'm going to use this one example from, you know, the complaint. If there is such a pattern and practice of which plaintiffs complain, it would be demonstrable through what has already been produced.

MR. JACOB: If you can't demonstrate it in 1,500 records, Your Honor, you're not going to be able to demonstrate in 20,000.

THE COURT: And you're saying that the plaintiffs have failed to demonstrate a particularized need or sufficient material for me to go along with them that something more is necessary?

MR. JACOB: Correct. Under the standard of *Clark* and the other cases that we cited, they need to say -- they need to actually measure it against what's already in the record and

let that then be the basis for saying why some additional imposition on the plan to produce a bunch of additional things is actually warranted under the narrowly tailored circumstances. And they haven't even tried to do that in this motion, beyond the limited ones that I just walked through one by one.

And this equally applies, you know, *Booth* factor 3, they say we need these to assess whether they had adequate material to support decisions.

Booth factor 5, are they arriving at reasoned and principle decisions.

The court has three summary judgment motions already. Ultimately it's going to have nine. And the court is going to need to assess with respect to each of those records under an abuse of discretion standard is that the case or not. Again, if they can't show that in 1,500 records, they're not even going to be able to show it among the nine records.

But it's also important for the court to weigh that their claim that their individual experiences of these nine plaintiffs is typical of all of the class members. We disagree with that but that is their claim. And for them to say, sure, we've got the hundred evaluations for them, plus we've got an additional 1,361 evaluations, but we need still more in order to evaluate whether our typical plaintiffs were infected by a problem of reasoned decision-making. That is not the way that

Booth factors 3 or 5 are supposed to work.

You take a look at the summary judgment record that's there, and if there's a particular problem that arises with the evaluation of that record, where they can say, well, to evaluate this particular problem in this record we would need to know this additional thing. And so then we might -- we would have a discussion with each other, and then ultimately with the court if we can't agree, whether some narrow additional targeted discovery is needed to resolve that.

All of the things that they said about Dr. Macciocchi are a great example of this. He only evaluated Plaintiff McKenzie, one person out of all of these nine people.

The other things I'll say about their invocations of Dr. Macciocchi, and why that doesn't warrant this kind of additional discovery. This is not a particularized request based on anything that he allegedly did wrong with respect to his evaluation of Mr. McKenzie. They cite to quotes from what they say were presentations at conferences or here was the title of the presentation of the panel. But they don't attach any of that to demonstrate that Dr. Macciocchi actually had some kind of problem.

Again, they're trying to get 20,000 records -- I see the court's raised eyebrows. You know, I look at the allegations in the complaint and say the same thing. But the way this should work is we would take Plaintiff McKenzie's summary

judgment record. We would take a look at that administrative record. We would see what Dr. Macciocchi did there. They would present the actual evidence that they have of some alleged problem with Dr. Macciocchi. We would be able to come in and rebut that and say, actually, they're misquoting the presentation, Your Honor, or that was actually just what somebody wrote for the name of the panel as a whole and not a direct quote attributable to Dr. Macciocchi. We would have that discussion. And then the court would determine whether some limited targeted discovery into Dr. Macciocchi in particular was warranted.

THE COURT: And his decision-makings.

MR. JACOB: Exactly. But that's not been briefed because that's not this motion. This motion is 20,000 documents irrespective of any particular doctor.

And the last thing that I wanted to make sure that I address here is they're pointing to all of these cases that they say, well, because courts have criticized the plan in certain cases, that warrants all of this additional discovery. I've got several responses to that.

First, they lay all of these cases out, they had a lot of them in their presentation, but they're all in footnote 3 of their reply. They have 13 cases over the course of 40 years. That's less than one every three years during that period of time that had some harsh judgment about what had been done in a

particular case. That is not remotely unusual for a plan to have that kind of track record, particularly where they, themselves, allege it's typical to have a thousand claims filed in a given year.

So over a three-year span where you have 3,000 claims filed and one case that adjudicates that the court got it wrong?

THE COURT: Well, that's because most things don't go to adjudication. We both know that. But I understand what you mean.

MR. JACOB: A lot of things don't. But also, again, the approval rates for these disability benefits, higher than 50 percent for both line-of-duty and for T&P, and the neurocognitive I think is around 26 percent. Those are high approval rates.

We also have, you know, in addition to that, you know, completely inconsistent with what they allege, but this is a plan that paid out a billion dollars in benefits between 2017 and 2022, all of the evidence is cited at page 2 of our class certification opposition. In 2022, paid out 257 million in benefits. I can represent to the plan that in 2024 it was 366 million. So it's an upward trajectory.

Again, the Miller declaration to the class certification papers at paragraph 5, 23 percent of participants in this plan were getting disability benefits. I don't think there's any

other disability plan in existence where 23 percent of those eligible to get benefits are getting benefits from it for an average of $86,000 a year.

So, again, when you actually look at the factual record here, which they don't engage with, it's completely inconsistent with this notion that this whole thing is a sham. But when the court takes a look at those cases -- so, in addition to the fact that it's 13 over a 40-year period -- I presented the court with Exhibit 2. This is just a list of cases, 21 of them over the same span, that affirmed the court's decisions and found that the court, that the plan didn't abuse its discretion.

So to the extent that they just want to play a numbers game, hey, we had 13 that we lost over a 40-year period. There's 21, and, again, I'm not commenting on the substance of them at all, but those are all merits wins for the board where the board's judgment ultimately got affirmed.

THE COURT: I understand.

MR. JACOB: For the 13 they do cite, all of them predated the neutral role. So the neutral role, which is the key thing that's at issue in this case, whether, you know, because a neutral physician finds that a person is not, you know, if no neutral physician finds that the player is disabled then they can't award benefits. That is the setting for this whole case. All of those decisions took place under a

different set of rules.

And that's particularly relevant because cases like the *Jani* case in the Fourth Circuit and the *Stewart* case in the District of Maryland that they cite to, the criticism in both of those cases is that the plan failed to defer to the neutral physician. There was a neutral physician opinion that the person was disabled, and the board in those cases, because it predated the neutral rule, didn't find the person was disabled. Those cases would actually support what the plan is doing in these cases today, which is saying that we're accepting the judgments of neutral physicians here.

Similarly, the *Armstrong* case that they cite. There, they said that there were delays caused by the arbitration process that existed at that point in time, 40 years ago. That has been completely changed and amended in the plan so now it is a much more faster process.

The *Ashmore* case that they cite where somebody was denied benefits because they failed to attend a scheduled neutral physician examination.

THE COURT: Do you take the position, and I don't mean as a general proposition for every case, but do you take the position in this case that because it is, you know, there's a putative class and there's multiple named plaintiffs, and so the record discovery, the administrative record discovery ends up just by a matter of necessity because of the number of named

plaintiffs is whatever number of thousands of documents that you said that it is.

Do you take the position or are you of a mind that although as a sort of generic proposition extra record discovery to thoroughly and adequately evaluate the *Booth* factors is always sort of a -- of course that's a possibility, it depends on what a given case is about, and that in a case where, like, *Cloud* or like other single claimant cases there isn't the robust body of evidence that's been produced; that those cases might cry out more for extra record discovery, more than this case?

MR. JACOB: Yes, exactly. The *Clark* case, again, says where the record is there you have to evaluate it in light of the existing record. And, again, *Cloud* did not -- if you look at the discovery order in that case, it denied the broad requests for all benefits across the plan. It denied the requests for all underlying claim record. It only allowed a limited one. But I think that's exactly right.

Had the plan, in that case, come forward and presented a record of consistent application of those plan terms prior to that discovery determination being made, the court would have needed to assess that.

Now, of course it's an out-of-circuit decision so we didn't have the Fourth Circuit and Maryland law --

THE CLERK: Yep.

MR. JACOB: -- that counseled that that is the correct approach. But, absolutely, we think -- we absolutely agree that those cases need to sort of be put to the side because that's not this case.

Here, we do have a specific record and that's why -- again, they may have targeted discovery motions to particular summary judgment records for particular plaintiffs where they can show some particular gap, but what they have not done in this case, in light of the very expansive record that's there, is demonstrate this kind of sweeping discovery, again, unprecedented, none of the courts that they cite have granted this sort of thing.

It would literally break ERISA if plaintiffs could come into court with allegations like these where they cite, almost entirely just to their own complaint allegations, present a couple of records that I've walked the court through that don't demonstrate inconsistent application at all, and then use that to get every claim record that has been decided over the course of a six-year period of time. It would just be completely unworkable.

And, again, that's the insight of the *Reichard* case, of the mini-trials that that would give rise to.

The only other things, I just wanted to make sure I complete their *Booth* factor 6 on pattern and practice. We've talked about consistent treatment and we've talked about

ignoring plan documents. Those are all of those allegations of inconsistency that don't flush out.

Impartiality of the physicians they say is one of the things they need. Again, the claims data fully allows for processing of that.

Failure to review all documents. Adding these into the record is not going to allow an additional assessment of that. It's all going to be about deposing these particular witnesses who say here's the way that the record gets done through a delegation to the party advisors, and this is the way the process works.

But they've got 1,500 records and the court can see when it takes a look at those records, those are not going to add anything to the court's knowledge of whether the underlying records really were reviewed or not. They all represent that they were. And so it's the people who are making those representations that are relevant there.

And then they talk about the inadequacy of the decision letters. They say, "Hey, these aren't giving us fair notice of what is in there."

Again, the summary judgment motions are pending but the court can see, with respect to each of these, you have to take a look at each individual decision letter to see whether did they actually describe the adequate basis on which this claim was decided or not?

If the court looks at the summary judgment briefing, I'm confident the court will be completely convinced that we've put in everything that ERISA requires on each of them. But adding 20,000 additional records into the, you know, thousand plus that are already in there is not going to help the court evaluate that.

And then their last one was failure to provide requested documents. Of the named plaintiffs, Mr. McKenzie is the only one who even alleges that he requested documents that were denied. That is not a basis to say, let's go searching among 20,000 other plan documents to see whether anybody else requested plan documents that were denied. Particularly where each denial is going to have to be individually assessed as to whether it was warranted or not under ERISA standards for the kind of information that is supposed to be given.

So unless the court has -- I really appreciate the court's time, particularly, I know I did a very long walk through the *Booth* factors.

THE COURT: No, it's helpful.

MR. JACOB: If the court doesn't have any other questions, I'll end my argument.

THE COURT: I do not have any other questions.

MR. JACOB: Thank you, Your Honor.

THE COURT: Why don't we take another short recess and we'll come back for rebuttal. Just about five or 10 minutes.

I know everybody is probably getting hungry, including my very dedicated court staff. So I just want to be mindful of their wishes. Thanks.

THE CLERK: All rise. This Court stands in recess.

(There was a break at 12:52 p.m. to 1:08 p.m.)

THE COURT: Please don't apologize. When I came out and saw you weren't here, I said it was unfair for me to come out without fair warning so take your time.

I have one more question, Mr. Barnett, for Mr. Jacob. So I'm going to ask that question. Mr. Jacob, please be comfortable and stay wherever you would like.

One of the things that plaintiffs present to the court is the idea that the plan-wide V3 data or that I should say that your client is not able to discharge its duties adequately based on use of V3 plan-wide data. And that, if that is the case, that that is a problem for you on this motion, can you respond to that?

MR. JACOB: Yes, Your Honor. First, there is no such duty. So they don't cite a single case that has ever held that an ERISA fiduciary conducting a disability plan or a health plan that has third-party reviewers is required to maintain statistics about the individual findings of those reviews. There simply is no such duty. So they've got no citation on that.

And, in fact, if you take a look at the *Zahariev* case,

which we cited, there the fiduciary said, "We don't have any such data." The court said, "Yeah, I'm not going to make them produce all of the underlying record if they --"

THE COURT: If they don't maintain it.

MR. JACOB: Correct. And similarly, in the *Casco* case, which is one of the ones that they cite, there they did have data about recommendations, but they didn't have data about the ultimate claim determinations. So we have the opposite. Different administrators of plans do different things. But for us, it actually, for the reasons that we've cited and that are described in Mr. Vincent's declaration, it would actually be affirmatively harmful to the plan to have a database that tracked all of these things because then we would have constructive knowledge of the denial rates of all of the neutral physicians, and that would be charged to us. And then, even though he only wants to be using these neutral factors, and I think, you know, I know Mr. Vincent, I think as a human being he only would still use those neutral factors --

THE COURT: It's like blind grading your students' blue books.

MR. JACOB: Yes.

THE COURT: I get it.

MR. JACOB: But the constructive knowledge would be there, and it's one of the potential harms to us in creating the kind of database that plaintiffs --

THE COURT: And so the ARs for the named plaintiffs are what they are and the V3 database, you know, and I'm not getting into whether it was disclosed that it existed or blah, blah, blah, but that's really of no moment.

MR. JACOB: That is of no moment. And, again, I can just represent to the court as well, there is a process by which a randomized sample of neutral physician evaluations are sort of reviewed at the end of the year so there can be a quality check, as to putting the things in them that need to be in there, et cetera.

It's not that there's no process there, but statistics, there's no court that has ever held that that is something that needs to be done and it would not be useful to us. In fact, it would be harmful.

THE COURT: Okay. Thank you.

MR. JACOB: Thank you.

THE COURT: Mr. Barnett, or whoever is going to rebut, I'm happy to hear from you.

MR. BARNETT: I'm going to start, Your Honor, and depending how the discussion goes, Mr. Katz may be involved as well.

THE COURT: That's fine.

MR. BARNETT: I'm going to say what attorneys always say at the start of rebuttal, I'm going to be brief. But given the hour, I really am going to try to be very brief.

Obviously, if you have any questions --

THE COURT: I'm not shy.

MR. BARNETT: I'm happy to respond to those.

I'm actually going to start where you just ended, which is the requirement in terms of a system. There is a requirement to have an adequate system in place and presumably as a fiduciary under duty of loyalty and care, there is some obligation to see whether the benefits decisions are made are consistent with ERISA and with the plan documents. And my understanding is that these defendants currently have no audit in place to do that. If I'm wrong, I apologize, Mr. Jacob can correct me.

But it's inadequacy of the system, in our view is the V3 system, is inadequate because it does not contain the individual recommendations of individual physicians. And not having that information does in fact result in blindness. We think that blindness is willful because they don't really know whether the safeguards they put in place are actually working.

THE COURT: When you say "they don't really know that their safeguards are really working," and I don't mean this to sound smart because the transcripts are lousy for tone so this is a legit question, I'm not being sarcastic --

MR. BARNETT: No.

THE COURT: -- you are saying that a sort of conclusion that you wish me to agree with, not based on any

testimony, because I know depositions have been stalled, that where, you know, a 30(b)(6) or someone who is an administrator or responsible at the administrator level agrees with you that we do not have the kind of check, like Mr. Jacob just described? Which also is not evidence, I'm just asking the question.

MR. BARNETT: You're absolutely right. What I am suggesting is we are alleging --

THE COURT: I got it.

MR. BARNETT: -- we are arguing that the lack of a system in place, an adequate system that allows a plan to monitor and potentially audit whether the benefits decisions they are making are consistent with ERISA with their own plan documents. That is something we're working to prove through discovery. We're not there right now.

THE COURT: Uh-huh.

MR. BARNETT: Now, I'm sorry, I'm going to jump back in time and just hit a couple of points.

THE COURT: Okay.

MR. BARNETT: Early on you raised the statute of limitations and whether there's a different statute of limitations based on the claims and the short answer is yes, there is a different statute of limitations that applies to 502(a)(2) claims that doesn't apply to wrongful denial of benefits claims.

The court in *Cloud* denied the discovery for other decision letters because Mr. Cloud sought discovery for benefits he didn't apply for. We did not repeat that mistake. We only are seeking discovery for T&P, for line-of-duty, and for neurocognitive.

And the decision in *Cloud* to deny -- the judge in *Cloud* did grant him extra record discovery of other decision letters but not for benefits he didn't apply for.

THE COURT: Yes, she gave plaintiff a haircut on that request.

MR. BARNETT: Right. And we're not in that situation because we're not seeking anything that our named plaintiffs didn't apply for. And we've excluded other benefit applications for, like, the 88 plan and that sort of thing. And, ultimately, we're only asking for decision letters that were actually communicated to the applicants, which eliminates a lot of bureaucratic paperwork that has nothing to do with the final decision. That's what we're after.

The V3 data, it's both incomplete and it's inaccurate. It contains the physician names, we believe those were redacted when they were produced, and it doesn't contain the compensation information.

There was a question about the, quote/unquote, "claims data" and we know what the final decision was because at least one of the physicians had voted in favor of the benefits. The

important thing to keep in mind is that individual physicians can only control what they can control. And so certainly a neutral physician can't anticipate what other doctor may decide in terms of eligibility and awarding benefits.

But, if we get the information as to the individual physicians, we will know exactly what the recommendations were. And ultimately we'll get their -- we have their compensation information. So we will be able to graph this out and present it to the court down the road. We can't do that with the V3 data.

Respectfully, the defendants really want to have it both ways. They're refusing to produce the only source of information that, again, is relevant to our claims and to their defendants, and then arguing that we don't have enough information to prove our claims. And it's clear what the strategy is. Mr. Jacob just described it. They've moved affirmatively for summary judgment on three of the plaintiffs, their intention to move forward on nine.

And so they can't have it both ways. There has to be --

THE COURT: What do you mean both ways?

MR. BARNETT: They can't refuse to produce discovery that we believe is essential to our claims and then turn around and based on that refusal and not having that information and say we can't go forward with our claims, including our 502 -- sorry (a)(2) claims.

THE COURT: Well, but that, you know, that ignores to some extent the fact that they disagree with you that the information you're seeking is essential to begin with.

MR. BARNETT: Well, and to that -- we, we're operating under fairly stringent page limitations in terms of what we could move. We didn't throw everything in that we could have. We had to be selective in terms of what we're alleging.

Also, candidly, we're at the beginning of discovery. We're not in a position where we can prove everything. That's what we're working to do.

There was a suggestion made that we had not produced the data underlying the statistics in the allegations in the amended complaint. That is flatly wrong.

THE COURT: I've seen that correspondence.

MR. BARNETT: Okay. I just wanted the court to assure that all of that information --

THE COURT: I understand everybody's position.

MR. BARNETT: -- all of that information has been produced.

Also, very key point. We're not asking for a mini-trial on each of these claims. Nor is a mini-trial going to be necessary. We're just asking simply for the foundational discovery that we're entitled to under Fourth Circuit and District of Maryland decisional law.

Now, you had asked a question about whether extra

administrative record discovery is an ill-fit for this case, we do think this case is different from the other cases. In part because of the 502(a)(2) claims, because of the allegations related to a fraudulent scheme, because of the allegations and the evidence of pattern and practice of ERISA violations which the defendants really didn't address today in their argument at all.

And finally, again, we were hopefully thoughtful and strategic in terms of identifying the applications that we're asking for. We limited it by time frame and by benefits and the fact that they were only communicated to applicants.

So pardon me one second.

There was discussion about the 1,500 decision letters. Just to be clear, most of those 1,500 decision letters were produced by us. The defendants have produced a very small fraction of decision letters and in some cases those are incomplete.

So it would be weird in a situation where we would somehow be punished by not being permitted to pursue discovery because we have produced a much larger volume of documents than the defendants have.

Without appearing to be cavalier, the argument at the end really boils down to, you know, the defendants have approved a lot of applications, we've paid a lot of money, there's really nothing for the court to see here, please don't allow this

discovery.

Again, this discovery is critical. There's a reason we started with this discovery because it relates to all of our claims and our allegations. It will become the building blocks for taking additional discovery. And we have a whole series of discovery issues that we intend to bring to Magistrate Judge Aslan in a schedule and a structure that she approves. But we wanted to start here because this is so important to our case.

That's all I have, Your Honor. I think that was relatively brief. I'm happy to respond to you.

THE COURT: It was. I might have a few questions so just bear with me. Please have a seat and make yourselves comfortable. I just need to look through a few things.

Well, Mr. Jacob, I'll ask you then to address what Mr. Barnett contends you didn't address, which was the pattern and practice of ERISA violations and how that relates to the plaintiffs' request for extra record discovery.

MR. JACOB: Your Honor, actually, their pattern and practice is *Booth* 6, and I actually walked through every one of those. This is pages 20 to 27 of their brief. And I talked about their factor A is alleged consistency of treatment which -- we extensively walked through their alleged inconsistencies that aren't actually inconsistencies.

Their factor B is inadequate decision letters. We talked about the fact that you have to evaluate each decision letter

on its own, the summary judgment motions show that.

Their factor C is a failure to review all documents. We talked about the fact that, again, all of the documents represent that everything was reviewed. The neutral physician says, I reviewed all of the decision -- all of the medical records, et cetera, and it's going to be the depositions of Trustee Smith and the party advisors, not the production of 20,000 more documents that'll help with that.

D is the impartiality of physicians. That's the claims data which can be fully used to assess bias.

E is allegedly ignoring plan documents. That's the same as the consistency of treatment. We walked through all their alleged examples of that.

F is the de novo committee review. Again, producing 20,000 of these isn't going to help with that. And then there was the request for documents. We did walk through them all.

THE COURT: Okay. I don't have anymore questions.

Here's what I want to do, I'm going to do. I fairly know what I'm going to do, but I want to give myself time to sleep on some of these cases. I find that that's always a benefit, if for no other reason than I come across more articulate than I might otherwise be. So what I'm going to do is do just that, as opposed to rule from the bench.

What I will do is I will send an email to counsel off record to propose an agreed upon date to do an on-the-record

telephone oral ruling so that nobody has to come all the way back in just to hear me read something. I do not plan to issue a written opinion because I believe that you need a decision faster than you need a pretty document, as I said before. And it will take me far longer to put together a publishing worthy piece of writing than it would be to put my thoughts together in a cogent way that you will understand, in candor. So that's what I'm going to do.

I will sit with this over the weekend, and I will put together some thoughts that make sense, hopefully, and I will get with you about a time that would be appropriate to do that.

So, again, not that you're not entitled to come back to court, I don't know if you're really that into finding parking in Baltimore City, you're welcome to come back to court.

(Laughter.)

THE COURT: But my plan is to do just a telephone on the record. So I'll be here so that it technically is open to the public. And then we'll open up the phone line for counsel to join and you'll be on the record but just disembodied voice, as far as I'm concerned. Okay.

(All Counsel - "Thank you, Your Honor.")

THE COURT: I appreciate your thoughtful arguments and the importance of the issue to the case. Thank you. Court's adjourned.

THE CLERK: All rise. This Honorable Court is now

adjourned.

(Court adjourned at 1:26 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Ronda J. Thomas, Registered Merit Reporter, Certified Realtime Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 7th day of March 2025.

Ronda J. Thomas

Ronda J. Thomas, RMR, CRR
Federal Official Reporter

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